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Report on

Review of Civil Jury Awards

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

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LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON REVIEW OF CIVIL JURY AWARDS

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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To the Honourable Brian R. D. Smith, Q.C.,
Attorney General of the Province
of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
REVIEW OF CIVIL JURY AWARDS

Although the role of the civil jury is to make findings of fact in the case before it, in certain circumstances the law may permit the trial judge to take the case away from the jury or to direct a new trial. The Court of Appeal also has jurisdiction in some cases to review jury awards. The circumstances when the trial judge or the Court of Appeal may intervene, however, are fairly circumscribed and, even where the circumstances clearly warrant judicial intervention, the procedures which surround it and the results which flow from it often result in unnecessary expense to the parties.

The Commission undertook this study after one aspect of jury review was referred to us for consideration by your predecessor. In this Report, recommendations are made to modify the jurisdiction of a trial judge and of the Court of Appeal to review and vary a jury award that is wholly inappropriate. It is also recommended that juries be given information respecting damage awards made in similar cases. Adopting that practice may significantly reduce the need for review of civil jury awards.

A. The Jury

In a civil action involving a jury, the jury is the trier of fact. It considers and weighs the evidence and gives a verdict consisting of its conclusions about the facts in dispute. The judge conducts the trial, directs the jury on matters of law and reviews evidence. In many cases, the role of a trial judge sitting with a jury consists of entering judgment in accordance with the jury's findings. For example, in a negligence action the jury must determine whether the plaintiff was injured by the defendant's negligence and, if so, what measure of damages would compensate the plaintiff for that injury. In such an action, the judge would give judgment based on the jury's findings, unless exception were taken to those findings.

While the general rule is that a civil trial will take place before a judge alone,[1] a party to litigation has a right to have the matter tried by a jury, by giving notice, subject to Rules 39(18) and 39(20) of the British Columbia Supreme Court Rules. Rules 39(18) and 39(20) provide as follows:

Trial Without Jury in Certain Proceedings

(18) A trial shall be heard by the Court without a jury where it relates to
- (a) the administration of the estate of a deceased person,
- (b) the dissolution of a partnership or the taking of partnership or other accounts,
- (c) the redemption or foreclosure of a mortgage,
- (d) the sale and distribution of the proceeds of property subject to any lien or charge,
- (e) the execution of trusts,
- (f) the rectification, setting-aside, or cancellation of a deed or other written instrument,
- (g) the specific performance of a contract,
- (h) the partition or sale of real estate,
- (i) the custody or guardianship of an infant or the care of an infant's estate, or
- (j) a matter referred to in Rule 10(1). (MR 427; ER 33/5.)

Court May Refuse Jury Trial

(20) Except in cases of defamation, false imprisonment and malicious prosecution, a party to whom a notice under subrule (19) has been delivered may apply
- (a) within 7 days for an order that the trial or part of it be heard by the Court without a jury on the ground that the issues require prolonged examination of documents or accounts or a scientific or local investigation which cannot be made conveniently with a jury or the issues are of an intricate or complex character, or
- (b) at any time for an order that the trial be heard by the Court without a jury on the ground that it relates to one of the matters referred to in subrule (18). (MR 426a, 429; ER 33/5.)

What will constitute matters too intricate or complex to be submitted to a jury depends upon the facts in each case. Malpractice actions involving technical evidence[2] and allegations of negligence and contributory negligence[3] have been held to be suitable for jury trials. In recent cases,[4] submissions that matters involving discount rates, costs of future care and future loss

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[1] Rule 39(17).

[2] *E.g., Foster* v. *Prins*, (1979) 13 B.C.L.R. 238 (B.C.S.C.).

[3] *Jeanes* v. *Woodward Stores (Park Royal) Ltd.*, (Vanc. Reg. No. 19460-72, 15 June 1973) [1973] B.C.D. Civ. "Practice — M.R. 429"; unless combined with other issues, *e.g.*, occupier's liability, ownership, consent, etc.: *Gordon* v. *Johnson*, [1973] 5 W.W.R. 385 (B.C.S.C.).

[4] *E.g., Kovach* v. *David Martens & Sons Ltd.*, (1979) 11 B.C.L.R. 64 (B.C.S.C.); *Foster* v. *Prins*, (1979) 13 B.C.L.R. 238 (B.C.S.C.).

of earning capacity are too complex to be heard by juries have been unsuccessful. On the other hand, trials involving issues of both tort and contract,[5] applications under the *Family Compensation Act*[6] or difficult distinctions between the liability of licensees and invitees,[7] have been held to be inappropriate for a jury.

British Columbia courts are reluctant to diminish a litigant's entitlement to trial by jury. Trial by jury is regarded as a fundamental right. It has been said:[8]

> Curtailment of the right to jury trial should occur only to the extent this is clearly shown to be necessary; if this case is unsuited to jury trial, then the use of juries in similar personal injury cases will be equally inappropriate, and an institution which has long enjoyed public esteem, and the respect of the courts, will cease to play much of its historic role in civil proceedings in this province."

In Foster v. Prins, Hutcheon J. remarked:[9]

> As to the right of a plaintiff to have a trial by jury, I am very much impressed with the undoubted fact that cases of this kind, and in this I include the question of whether the alleged condition of the plaintiff flows from the accident, have been decided by juries for many years. In my view, if there is to be a change, it must be brought about either by a change in the rules or by some other legislative change, or by the presentation of evidence that members of the juries are protesting about the complexity of the task.

Jury participation involves the public in the administration of justice, ensuring that the law remains in touch with the needs and the views of the community. The virtues and the defects of the jury system are widely acknowledged. It has been observed, for example, that:[10]

> The value of the jury system is that it brings to the law the application of the common sense existing in the community. If judges alone fix all the damages in personal injury actions it is thought that because of their "cloistered" position they might not keep pace with the times.
>
> In some instances judges' awards might be too low, in others too high. The jury therefore has an educating effect upon the law because if juries consistently award damages which are markedly different than those fixed by judges themselves then it seems the judiciary should examine the basis for its assessments.
>
> On the other side of the coin, experience has shown that jury awards wander from one extreme to another in circumstances where different plaintiffs have similar injuries. Sometimes a jury will give one such plaintiff nothing or perhaps a modest verdict of $200. Other times a plaintiff with an almost identical injury might receive from a jury an award of $100,000.
>
> None of these decisions are collected in any organized way as are reasons of judges, and so it is impossible to say with any degree of accuracy what effect civil jury verdicts in personal injury actions actually do have on our system of law.
>
> In addition, it is a fair guess that less than 2 to 3 per cent of the personal injury actions tried in British Columbia are decided by a jury. The remainder is heard by a judge alone. Still there are innumerable instances where juries return verdicts in keeping with the evidence and these verdicts are not substantially at odds with what a judge would have given if sitting without the assistance of a jury.
>
> The average civil jury case usually remains a secret to the rest of the world when it is over. The decision seldom receives much publicity in the media except in isolated instances. This contrasts in some ways with the barrage of material on jury awards that comes to us from south of the border. Consequently it is a good guess that laymen who serve on juries have heard far more about the dollar value of jury verdicts given in the United States of America than they have about those rendered in British Columbia, let alone other Canadian provinces.

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[5] *Robitaille* v. *Vancouver Hockey Club Ltd.*, (1979) 12 B.C.L.R. 335 (B.C.S.C.).

[6] *Johnson* v. *Nickel*, [1972] 4 W.W.R. 272 (B.C.S.C.).

[7] *Williams* v. *University of British Columbia*, (1969) 71 W.W.R. 572, 9 D.L.R. (3d) 562 (B.C.C.A.).

[8] *Kovach* v. *David Martens & Sons Ltd.*, *supra*, n. 4 at 67, *per* Cashman J. quoting Taylor J. in *Gillis* v. *Bates* (unreported) December 4, 1978.

[9] *Supra*, n. 2 at 241, *per* Hutcheon J.

[10] *Force* v. *Gibbons*, (1978) 9 B.C.L.R. 144, 150-1, (B.C.S.C.) *per* Bouck J.

Juries may have problems determining the appropriate measure of damages and in many cases their findings are difficult to justify. In part, unusual results are due to a jury deciding out of sympathy or prejudice rather than logic. For example, in one case[11] involving a motor vehicle collision, the defendant was Buster's, a towing company operating in Vancouver. They removed cars illegally parked. In the conduct of their business, they generated a great deal of ill will among the residents of Vancouver. The jury found, in this case, that Buster's was only 5% liable for damages, but set damages at $455,000. It was said:[12]

> . . . the name "Buster's" is, in Vancouver, to be equated with the religious concept of anathema, and it is expected that the plaintiff would, in the jury's eyes, be entitled to enormous sympathy, particularly because of the terribly serious nature of his injuries. Their sympathy clearly shows in the quantum of damages.

In *Benson* v. *Kwong Chong*,[13] a case which involved a motor collision between people of different racial origins, the jury found in favour of the (white) plaintiff. Their verdict was overturned on appeal. A new trial was ordered. In all, three trials were held. Each time the jury found for the plaintiff and each time the Court of Appeal held the jury was wrong. The reports do not reveal why the juries consistently came to a conclusion which the Court of Appeal could not accept and one might suspect that the juries were motivated by racial prejudice. The matter finally went to the Privy Council, which concluded that a verdict must be entered for the plaintiff.

In other cases, an unusual result may be attributable solely to the jury's inability to understand the issues in dispute. In *Kraus* v. *Woodwards Stores Ltd.*,[14] for example, the plaintiff was an elderly woman who had been bumped by a sales clerk. She fell and was injured. If the sales clerk had been negligent, the defendant department store would have been vicariously liable in damages for the acts of its employee. The jury listened to the evidence, retired and returned. They told the judge they thought the department store should be a defendant in the action and, to their surprise, were informed by the judge that the department store was the defendant. They were bewildered by the concept of vicarious liability. The verdict they finally delivered appeared to be based more upon concepts of occupier's liability than negligence. In effect, the jury's findings were based upon issues extraneous to those actually in dispute.

Cases such as these call into question the utility of jury trials. Even though juries are usually composed of responsible people who return verdicts which cannot be successfully challenged, from time to time curious results ensue, which, if permitted to stand, would be unjust.

Historically, only a few means have been available to place controls on jury verdicts to avoid unjust results. The first method was the writ of attaint. Later the appeal courts were able to order new trials:[15]

> It must be remembered that in a jury case the verdict was in early days final, subject only to the ancient writ of attaint against the jury, which has been obsolete for many centuries (see Blackstone's Commentaries, bk. 3, c. 25), while matters appearing on the record might form the subject of a motion to arrest judgment or to enter judgment *non obstante veredicto*. In the seventeenth century the practice of granting new trials came into vogue. But no one was allowed to apply for a new trial on a point of law unless he had taken it at the trial. An application for a new trial on the ground that the verdict was against the weight of evidence was, of

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[11] *O'Dwyer* v. *Buster's Auto Towing Services Ltd.*, (Unreported B.C.S.C. decision *per* Gould J.) Van. Reg. No. 43627, March 10, 1978; [1978] B.C.D. Civ. "Practice—Jury Trial."

[12] *Ibid.*

[13] [1932] 3 W.W.R. 61 (P.C. on appeal from the Court of Appeal of New Zealand).

[14] (1953) 8 W.W.R. 358, *rev'd.* (1953) 10 W.W.R. 385, *aff'd.* [1954] 3 D.L.R. 321 (S.C.C.).

[15] *Banbury* v. *Bank of Montreal*, (1918) 44 D.L.R. 234, 258-9 (H.L.) *per* Lord Finlay L.C.

> course, a different matter altogether, and on the hearing of a rule for a new trial upon this ground it is now open to the court of appeal to enter judgment on the ground that there was no evidence, always subject to the consideration that the point must have been taken at the trial, as there is nothing in the rule to supersede the existing law upon the subject.

The current powers of a trial judge and of the Court of Appeal to reject or modify a jury verdict are limited. A Court of Appeal will, in most cases, refuse to vary a jury verdict. The powers of a trial judge or Court of Appeal, in this respect, depend in large part upon the functions juries are intended to serve in the administration of justice. Nevertheless, because strange and unjust results do arise from time to time, the law respecting review of jury awards should be examined. This is a matter which was referred to us by the former Attorney General.

B. Sources of Jurisdiction

In Chapter II, we examine the jurisdiction of a trial judge to review a jury's verdict. In Chapter III, we examine the jurisdiction of the Court of Appeal to review the judgment of a trial judge as well as the verdict of a jury.

It is difficult to determine in many cases whether the sources of these jurisdictions are inherent or flow from statute. For the most part, those are questions which need not be resolved, although occasionally the current powers of a trial judge or of the Court of Appeal cannot be determined without addressing that issue. Our discussion of the sources of the courts' jurisdiction is confined to these latter cases.

In our discussion of the current law, we refer to various practices adopted by the courts. Where those practices have been specifically altered by legislation, that legislation is referred to. The case law of other commonwealth jurisdictions in which similar practices have been adopted is useful to consider and we refer to some English, New Zealand and Australian cases, as well as cases arising out of other Canadian jurisdictions. English case law is particularly helpful since the practice of our courts has been shaped by that of English courts and, until the 1976 revision of the Supreme Court Rules, our rules of court were modelled after, if not identical to, the English Rules.

A. Taking the Case from the Jury

The jury is the trier of fact. If there is enough evidence adduced at trial to put a matter in issue, the question of weight to be given to that evidence must be left to the jury.

Where there is no evidence or the evidence is insufficient to support the plaintiff's case, the trial judge should discharge the jury. A motion that there is insufficient evidence to go to the jury made at the close of the plaintiff's case is called a motion for a non-suit. A motion to that effect made at the close of the defendant's case is for dismissal. If the onus of proof is on the defendant and he has not satisfied it, the trial judge should direct a verdict for the plaintiff. The trial judge has jurisdiction to withdraw a particular question or the whole case from the jury, either on the request of counsel or otherwise.[1] It has been said:[2]

> . . . [W]hile neither the judge at the trial nor this Court of Appeal is or are judges of fact, yet both the one and the other are, for all purposes, judges of the question of the absence of fact, by which I mean, judges of the question whether there was any evidence to go to the jury or any evidence upon which a jury could reasonably find a verdict for the plaintiff.

If there is no evidence, the trial judge must discharge the jury or, if the jury's verdict is accepted, the Court of Appeal must set aside that verdict.[3] Where there is some evidence, the trial judge must decide whether a jury could reasonably come to a conclusion based on it. If not, the trial judge may direct a verdict or enter a non-suit.[4]

It has been said that:[5]

> . . . there is in every case . . . a preliminary question which is one of law, viz., whether there is any evidence on which the Jury could properly find the question for the party on whom the onus of proof lies. If there is not, the Judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff or direct a verdict for the plaintiff if the onus is on the defendant . . . [I]t is now settled that the question for the judge (subject of course to review) is . . . not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.

Nevertheless, the line between insufficient evidence and sufficient evidence, is difficult to draw.[6]

In *Danley* v. *C.P.R.*,[7] for example, D, an employee of the defendant, was killed while engaged in his work of coupling and uncoupling cars during switching operations. No one saw the accident. Evidence was led that other employees were aware that the coupling lever D had used was defective. The jury found that the defendant was negligent and that there was no contributory

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[1] *Banbury* v. *Bank of Montreal*, (1918) 44 D.L.R. 234 (H.L.); *Ryder* v. *Wombwell*, (1868) L.R. 4 Ex. 32; *Waugh* v. *Shaw*, (1916) 29 D.L.R. 742, 50 N.S.R. 176 (N.S.S.C. *in banco*).

[2] *Skeate* v. *Slaters, Ltd.*, [1914] 2 K.B. 429, 437 (C.A.), *per* Buckley L.J.

[3] *Mechanical and General Inventions Co. Ltd.* v. *Austin*, [1935] A.C. 346 (H.L.); *Gray Coach Lines Ltd.* v. *Payne*, [1945] S.C.R. 614.

[4] *Hiddle* v. *National Fire and Marine Insurance Company of New Zealand*, [1896] A.C. 372 (P.C.). But a judge cannot direct that the plaintiff has proved his case if the burden of proof is on the plaintiff: *Evenden* v. *Merchants Casualty Insurance Co. (No. 1)*, [1935] 2 W.W.R. 484 (Sask. C.A.).

[5] *Ryder* v. *Wombwell*, (1868) L.R. 4 Ex. 32, *per* Willis J. at 38; cited with approval in *Banbury* v. *Bank of Montreal*, (1918) 44 D.L.R. 234, 265; *Wright* v. *C.N.R.*, [1938] 1 D.L.R. 496 (Ont. S.C.); *see also Jewell* v. *Parr*, (1853) 13 C.B. 909, 138 E.R. 1460, *per* Maule J. at 916.

[6] *Peart* v. *Grand Trunk Railway Co.*, (1905) 10 O.L.R. 753 (P.C.); *MacKinnon* v. *Miller*, [1909] S.C. 373; *Simpson* v. *London, Midland and Scottish Railway Co.*, [1931] A.C. 351, 357 (H.L. (Sc.)).

[7] [1940] S.C.R. 290.

negligence on the part of D. It awarded damages of $8,000. The Saskatchewan Court of Appeal reversed the jury's verdict, finding that there was insufficient evidence for the jury to decide the issue. The jury's conclusion was based on mere conjecture. The Supreme Court of Canada restored the trial judgment. The jury, not the Court of Appeal, is entitled to draw inferences and it does not matter that its verdict may not commend itself to the judgment of the Court.

Rinfret and Kerwin JJ. dissented:[8]

> . . . I am unable to find that the jury had before them any evidence upon which they could do more than guess at the cause of the unfortunate accident.

In *Hiddle* v. *National Fire and Marine Insurance Company of New Zealand*,[9] the plaintiff, whose inventory had been destroyed, brought a claim against his insurers. Under the insurance policy, the plaintiff had to submit a detailed account of his loss. He submitted a very general account. The insurance policy provided that, unless a detailed account was submitted within 15 days of loss, the insured was not entitled to claim. The trial judge held that there was not enough evidence to go to the jury. The plaintiff contended that the question of whether the account was sufficiently detailed was one that should go to the jury. Upon appeal, it was held that the jury could not reasonably give a verdict to the plaintiff on the evidence and that the trial judge was correct to direct a non-suit. The court might as easily have concluded that the question of whether the account submitted was sufficiently detailed to satisfy the provisions of the insurance contract was a question of fact that should be decided by the jury.

The case should be left to the jury where the evidence on a question of fact is conflicting.[10] The case should be withdrawn from the jury where the only issues that remain are issues of law. For example, if the plaintiff alleges libel and proves the words were defamatory, but the defendant establishes privilege, the judge should not leave the issue to the jury, since the issue of privilege is one of law.[11]

If there is no evidence or the evidence is insufficient, the trial judge is under a duty to withdraw the case from the jury. Trial judges are reluctant to exercise that jurisdiction for two reasons. First, they must be careful not to intrude into the jury's jurisdiction as fact finder. Second, the difficulty of distinguishing insufficient evidence from sufficient evidence creates the possibility of an appealable error. In *Littley* v. *Brooks*,[12] for example, the trial judge withdrew the case from the jury, holding that there was insufficient evidence that the defendant was negligent. That decision was upheld on appeal to the Ontario Court of Appeal, but reversed by the Supreme Court of Canada, which held that there was sufficient evidence to go to the jury.[13] Clearly, if so many judges disagree on the sufficiency of evidence, the question is a highly subjective one that may be difficult to resolve. It has been observed:[14]

> In disposing of this question, as, *e.g.*, in negligence cases, the Judge must keep in mind the dissimilar functions of Judge and jury, and decide it upon his opinion as to whether the facts are such that the jury may reasonably act upon them. "The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be*

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[8] *Ibid.* at 301, *per* Kerwin J.

[9] [1896] A.C. 372 (P.C.).

[10] *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery*, (1878) 3 App. Cas. 1155 (H.L.).

[11] *See, e.g., Adam* v. *Ward*, [1917] A.C. 309 (H.L.).

[12] [1930] 4 D.L.R. 1, [1930] S.C.R. 416.

[13] *Ibid.*

[14] *Nickerson* v. *Forbes*, (1955) 1 D.L.R. (2d) 463 (N.S.S.C. *in banco*) at 466-7.

> *inferred*. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct": *per* Lord Cairns in *Metropolitan R. Co.* v. *Jackson* (1877), 3 App. Cas. 193 at p. 197. In doing so he runs the risk that an appellate Court may find that he should have withdrawn the case or issue from the jury, or that he should not have done so. In the former case, comparatively little harm may have been done; for the appeal Court can make the proper disposition of the case. In the latter case, however, there is no finding of the jury on the facts of the case as a whole or upon the issue withdrawn, and a new trial with [its] consequent expense and delay is inevitable.(Original emphasis)

Consequently, a practice grew up of letting the case go to the jury. The trial judge would then consider the jury's verdict and whether it was appropriate to enter a non-suit or direct a verdict:[15]

> It is no wonder that trial Judges have been loath to withdraw cases or issues from the jury even where the evidence is weak or almost non-existent but have preferred to procure the jury's verdict thereon. When this has been done the trial Judge may then review his opinion as to the sufficiency of the evidence, and give judgment under O. 34, r. 32 according to or contrary to the jury's finding or findings.

This practice has been adopted in a number of cases[16] and approved by the Supreme Court of Canada.[17]

However, the practice of reserving decision on a motion for non-suit, dismissal or directed verdict until after the jury returns its verdict has been disapproved by the House of Lords. In *Skeate* v. *Slaters, Ltd.*,[18] it was said[19] that the practice:

> . . . may result in a jury giving a verdict for the plaintiff and the judge then giving a judgment for the defendant, and is not without objection as it leads to misconception.

The test for whether a trial judge may ignore the jury's verdict is whether he could have directed the verdict before submitting it to the jury. If not, then even if the jury is hung, the trial judge cannot direct the verdict.[20]

B. Entering Judgment

Rule 41(1) of the British Columbia Supreme Court Rules provides that:

> (1) No application for judgment is necessary except where an enactment or these rules otherwise provides. (MR 463)

Under the former Supreme Court Rules, O. 36, r. 39 provided that:

> 39. The Judge shall, at or after trial, direct judgment to be entered as he shall think right (Form 11, App. F). No motion for judgment shall be necessary in order to obtain judgment. Any appeal from the judgment so directed shall be to the Court of Appeal.

The revision of this rule, by deleting "The Judge shall, at or after trial, direct judgment to be entered as he shall think right", raised several issues, which have now been resolved.

First, however, it is important to discuss the significance of O. 36, r. 39, which was identical to the English rule. In *Skeate* v. Slaters, Ltd.,[21]

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[15] *Ibid.* 467.

[16] *See, e.g., Shears* v. *Menderloff*, (1914) 30 T.L.R. 342; *Thompson & Alix Ltd.* v. *Smith*, [1933] S.C.R. 172; *Lakin* v. *Nuttall*, (1879) 3 S.C.R. 685; *Young* v. *Rank*, [1950] 2 All E.R. 166 (K.B.); *Halliwell* v. *Venables*, [1930] All E.R. Rep. 284 (C.A.).

[17] *Ibid.*

[18] [1914] 2 K.B. 429; *see also, Grinsted* v. *Hadrill*, [1953] 1 All E.R. 1188 (C.A.) where it was observed that, while a judge has power under O.36, r. 39, to enter judgment for a defendant if on the case as a whole a verdict in the plaintiff's favour would be set aside as unreasonable, a motion for no evidence ought not to follow the jury's verdict.

[19] *Ibid.* at 444.

[20] *Ibid.* at 434-5, *per* Lord Reading C.J.

[21] *Supra*, n. 18.

Sheasgreen v. *Morgan*[22] and *Silver's Garage Ltd.* v. *Town of Bridgewater*,[23] it was held that the judge's jurisdiction to enter a verdict contrary to that arrived at by the jury provided he could have taken the case from the jury, was based upon that rule. In *Skeate* v. *Slaters, Ltd.*, it was observed that the reference in the rule to Form 11, App. F, was to a document to be used for entering judgment when the trial was by a judge without a jury. That suggested that the rule had no application to trials with a jury. Lord Buckley concluded, however, that the rule should not be read restrictively.

The judge's discretion, however, is restricted. He may not enter any verdict that he thinks right. He can only enter a verdict if he could have withdrawn the case from the jury. A trial judge may not apply the principles referred to by an appellate court when reviewing the verdict of a jury.[24]

The revision of O. 36, r. 39, raised the issue of whether the ability of a trial judge to reject a verdict had been further restricted or removed. That issue was considered by the British Columbia Court of Appeal in *LeBlanc* v. *Corporation of the City of Penticton*.[25] They concluded that the revision of that rule had not changed the law.

A trial judge sitting with a jury may reject its verdict in a number of circumstances; but only if the judge could have directed a verdict before the matter was considered by the jury on the basis of insufficient evidence or no evidence, may the judge enter a verdict contrary to that arrived at by the jury. There is one exception to that principle.[26] Where the jury is confused by the issues and fails to consider the real point in issue, instead embarking on some perverse venture of its own, a new trial must be ordered, unless

(a) it is clear from the evidence that no cause of action existed at all,[27] or

(b) finding certain facts to be proved inferentially denies the existence of all other facts so pleaded.[28]

In *Haynes* v. *C.P.R.*,[29] for example, the headnote reads in part:[30]

> Generally speaking, a trial judge could not substitute his opinion for that of a jury and the greatest caution should be exercised before interfering with the verdict of a jury. In the case at bar, however, the trial judge rightly observed that the jury's findings could not, as a matter of law, support a verdict that the company's negligence amounted to reckless disregard for plaintiff's safety, and it was his duty to say so and to dismiss the action.

Should the trial judge disagree with the jury's conclusions respecting credibility or sufficiency of evidence, he may not substitute his opinion for that of the jury. Where the jury's findings of fact do not amount to a wrong recognized at law, however, the trial judge should reject its verdict and enter judgment consistent with its findings. In *Haynes*, for example, the trial judge concluded that the jury's findings of fact could not in law amount to acts or omissions which, taken cumulatively, could prove that the C.P.R. was guilty of reckless disregard for the plaintiff's deceased husband. The British Colum-

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[22] [1952] 1 D.L.R. 48 (B.C.S.C.).

[23] (1969) 1 N.S.R. (2d) 161, 8 D.L.R. (3d) 243, *aff'd.* [1971] S.C.R. 577, 2 N.S.R. (2d) 474, 17 D.L.R. (3d) 1.

[24] *LeBlanc* v. *Corporation of the City of Penticton*, (1981) 28 B.C.L.R. 179 (B.C.C.A.); the practice in Nova Scotia appears to differ, *see Manuge* v. *Dominion Atlantic Ry. Co.*; *Killam* v. *Manuge*, [1973] S.C.R. 232, 4 N.S.R. (2d) 884, 32 D.L.R. (3d) 49; *Cameron* v. *Excelsior Life Ins. Co.*, [1981] 1 S.C.R. 138.

[25] *Ibid.*

[26] *Woodward Stores Ltd.* v. *Kraus*, [1954] 3 D.L.R. 321 (S.C.C.).

[27] *E.g.*, as in *Canadian National Railways* v. *Lancia*, [1949] S.C.R. 177.

[28] *Andreas* v. *Canadian Pacific Railway Co.*, (1905) 5 C.R.C. 450, 37 S.C.R. 1, *Phelan* v. *Grand Trunk Pacific Railway Co.*, (1915) 23 D.L.R. 90, 51 S.C.R. 113.

[29] [1972] 6 W.W.R. 296 (B.C.C.A.).

[30] *Ibid.* at 297.

bia Court of Appeal held that the trial judge should have non-suited the plaintiff after the jury's verdict. Branca J.A. said:[31]

> It was, in effect, a finding at law that there was no evidence to prove negligence amounting to a reckless disregard for the safety of Haynes. It was not a substitution of the views of the learned trial judge for those of the jury. It was a case of the trial judge accepting the jury's findings and saying that the findings in law could not amount to a reckless disregard.

In *C.N.R.* v. *Lancia*,[32] a boy, trespassing, fell from a train and was injured. The conductor had shouted at him to get off the train (the boy was hanging on a ladder). The jury found the parties each 50% liable for the accident. The conductor's shout, the jury held, constituted a fault. The Supreme Court of Canada held that the jury was entitled to determine whether the conductor had actually shouted, but only the judge could determine whether that was a fault. The trial judge, who had reluctantly accepted the answers of the jury, should have rejected its verdict.

In *Sheasgreen* v. *Morgan*,[33] Manson J. directed the jury that an infant could be found contributorily negligent. After the jury returned, he decided his direction was wrong and varied its verdict.

Very seldom will a trial judge be in a position to exercise this jurisdiction. If there is some evidence upon which a jury could reach its verdict and the verdict is unequivocal, a judge must accept the result.[34] Moreover, some cases have suggested that if the defendant fails to move for a non-suit before the case is left to the jury, he may not make that motion after they have given their verdict.[35] The defence must take the consequences of not moving for a non-suit and adducing evidence.[36]

The better view appears to be that a motion before the case is left to the jury is not a necessary condition for the exercise of that jurisdiction. The jurisdiction is linked to the trial judge's ability to withdraw the case from the jury. If he could have withdrawn the case before the jury considered it, then he should be able to reject their verdict on the same grounds after, despite the fact that no motion was made before the case was left to the jury.[37]

C. Directing a New Trial

There are other circumstances where the trial judge may reject a jury verdict, but in those cases he may not enter his own verdict.[38] He may redirect the jury, but if their verdict is still unsatisfactory, his only course is to direct a new trial:[39]

> I should add that there is a vital distinction between the cases in which judgment may be entered on the ground that there was no evidence and those in which a new trial may be ordered on the ground that the verdict was against the weight of evidence. Judgment can be entered only if there was in point of law no evidence fit to be left to the jury. If there was any evidence, however plain it may

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[31] *Ibid.* at 305.

[32] *Supra*, n. 27.

[33] *Supra*, n. 22.

[34] *See, e.g., Force* v. *Gibbons*, (1978) 9 B.C.L.R. 144, 152 (S.C.); *DeNardo* v. *Brown*, (1967) 62 D.L.R. (2d) 323, 325 (B.C.S.C.); *Peterson* v. *Spilde*, (1972) 26 D.L.R. (3d) 500, 502 (B.C.S.C.).

[35] *Coca-Cola Company of Canada Ltd.* v. *Forbes*, [1942] S.C.R. 366.

[36] *Ibid.* at 368.

[37] *See Haynes, supra*, n. 29 at 307; *Edwards et al.* v. *Railway Executive, [1952] A.C. 737, [1952] 2 All E.R. 430; Skeate* v. *Slaters, Ltd.*, [1914] 2 K.B. 429; *Adam* v. *Campbell*, [1950] 3 D.L.R. 449 (S.C.C.); *see infra*, Chapter III on the Court of Appeal's power to set aside a jury verdict on this ground.

[38] *See Muis* v. *Alekson*, (1965) 53 W.W.R. 255 (B.C.S.C.); *DeNardo* v. *Brown*, (1967) 62 D.L.R. (2d) 323 (B.C.S.C.); *McCready* v. *Scott*, (1967) 62 W.W.R. 563, 66 D.L.R. (2d) 364 (B.C.S.C.), all of which were approved in *LeBlanc* v. *Corporation of the City of Penticton*, (1981) 28 B.C.L.R. 179, 185 (B.C.C.A.) *per* Taggart J.A.; *see also Schmidke* v. *Chouan*, [1976] W.W.D. 117 (B.C.S.C.); *Force* v. *Gibbons*, (1978) 9 B.C.L.R. 144; *Fields* v. *Lloyd*, (1980) 21 B.C.L.R. 134 (S.C.).

[39] *Banbury* v. *Bank of Montreal*, (1919) 44 D.L.R. 234, 259 (H.L.) *per* Lord Finlay L.C.

> appear on the probabilities of the case or the balance of evidence that the jury went wrong, a new trial only can be ordered. This distinction is not impaired in the slightest degree by the rule now well established that a verdict will not be disturbed unless it be one which the jury could not reasonably find.

If the jury's verdict is incomplete, or parts of it conflict, the proceeding is characterized as a "mistrial." If the jury's verdict is clear but against the weight of evidence and unreasonable, the jury's verdict is said to be "perverse." The trial judge must accept the jury's verdict unless there has been a mistrial or the verdict is perverse. He may not order a new trial. Unless there has been a mistrial or the verdict is perverse, ordering a new trial is essentially an appellate function.[40]

In *Shields* v. *North America Life Assurance Co.*,[41] the deceased insured had made material misrepresentations on his application for coverage. He said he was in good health, but evidence disclosed that he had been under the care of a doctor for continuing stomach trouble. The jury found that the deceased's representations were true. The Saskatchewan Court of Appeal reversed the jury's verdict and ordered judgment for the defendant (under the Saskatchewan Rules of Court), on the ground that the jury's verdict was perverse. Probably, the trial judge should have rejected the jury's verdict because it was perverse. The trial judge in those circumstances, however, would only be able to direct a new trial.

The current British Columbia Supreme Court Rules confer upon the trial judge limited jurisdiction to enter judgment in some of these circumstances. In the following discussion we will consider these aspects of the trial judge's jurisdiction to reject a jury verdict.

1. Redirection

The trial judge may send the jury back to reconsider its answers before accepting its verdict,[42] several times if necessary,[43] and the jury may alter its verdict before it is finally recorded.[44] After it has been discharged, however, the jury cannot be recalled to rectify its verdict.[45] Moreover, even after the jury is discharged, the judge cannot express an opinion as to what he would have awarded in the circumstances.[46] To do so would invade the jurisdiction of the Court of Appeal.

If a jury returns an unsatisfactory verdict, redirection by the trial judge is important for several reasons. First, it is possible that the jury misunderstood aspects of the evidence or issues which they were supposed to resolve. If the misunderstanding can be corrected, the jury will return a satisfactory verdict. Second, if the jury does not satisfactorily resolve the issues put to them, the trial judge does not have the jurisdiction to do it for them.[47] Redirection may save the expense of a new trial. Third, redirection may clarify the jury's answers, so that, if an appeal is taken from their verdict, the Court of Appeal is not placed in the position of having to guess what was in the minds of the

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[40] *Watson* v. *Fitzpatrick*, (1967) 62 W.W.R. 759, 65 D.L.R. (2d) 729 (B.C.S.C.).

[41] [1950] 1 W.W.R. 481 (Sask. C.A.).

[42] *Ellis* v. *British Columbia Electric Railway Co.*, (1914) 6 W.W.R. 1556, 20 B.C.R. 43 (B.C.C.A.); *Donison* v. *Vix*, (1954) 12 W.W.R. 185 (B.C.C.A.).

[43] *Herd* v. *Terkuc*, [1960] S.C.R. 602, *rev'g*. [1957] O.W.N.554; *Rayfield* v. *British Columbia Electric Railway Co.*, (1910) 15 B.C.R. 361 (C.A.).

[44] *Cf. Zablotny* v. *Levine*, (1981) 29 B.C.L.R. 6, (B.C.S.C.) *per* McKenzie J. in chambers. In that case it was held that the court had no power to require that the jury consider the issue after re-direction. The jury was dismissed.

[45] *Muis* v. *Alekson*, (1965) 53 W.W.R. 255 (B.C.S.C.); *Burbank* v. *Polacco*, [1976] 3 W.W.R. 180, (1975) 64 D.L.R. (3d) 563 (B.C.S.C.), *rev'd.*, but not on this point, [1977] 5 W.W.R. 153 (B.C.C.A.); *Salerno* v. *White*, (1982) 15 A.C.W.S. (2d) 39 (Ont. H.C.).

[46] *Muis* v. *Alekson*, *ibid.*

[47] *Burbank* v. *Polacco*, *supra*, n. 45.

jurors.[48] The case of *Gavin* v. *Kettle Valley Railway*[49] involved a collision between a train and an automobile. The jury could not decide who was at fault and suggested that the plaintiff and the defendant split liability 50-50. The British Columbia Court of Appeal criticized the trial judge. By failing to redirect the jury he placed the Court of Appeal in the position of having to guess what was in the jurors' minds. The Court of Appeal ordered that the matter be retried.

2. Mistrial

Even after redirection, the jury's answers may be so incomplete or so conflicting that judgment cannot be entered upon them. In these circumstances, the proceedings are characterized as a mistrial. The trial judge should direct that a new trial take place. A jury need not give reasons for its verdict and need not answer even specific questions. Should a jury give reasons, problems arise if these are inconsistent with the verdict.[50] Some courts have ignored the reasons, others the verdict. The usual course, however, is a new trial.

The Supreme Court Rules, 1976, affect the common law with respect to the finding of a mistrial on the basis of conflicting answers given by a jury. Rule 41 permits the trial judge to vary a jury verdict in certain circumstances.This jurisdiction is used reluctantly. In *Zablotny* v. *Levine*,[51] it was observed that the powers granted by Rule 41 are highly specialized, as opposed to the powers given to the Court of Appeal under the former rules, which were sweeping and general. Rule 41 does not authorize the trial judge to vary a jury verdict except in certain limited and recognized circumstances. If those circumstances are not present, the issues must be resolved by the Court of Appeal. Rule 41 is reproduced in Appendix A.

Rule 41(2) of the Supreme Court Rules provides as follows:

> **Judgment Impossible on Jury Findings**
>
> (2) Where, after such redirection as the Court thinks appropriate, a jury answers some but not all of the questions directed to it, or where the answers are conflicting, so that judgment cannot be pronounced on the findings, the action shall be retried.

The British Columbia Court of Appeal in *LeBlanc* v. *Corporation of the City of Penticton*,[52] made the following observations respecting Rule 41(2):[53]

> Of particular concern is subr. (2), upon which the trial judge relied for his conclusion that the answers of the jury were conflicting, and that he could therefore reject the verdict of the jury insofar as quantum was concerned. It will be apparent from a reading of subr. (2) that it is applicable where: first, a jury answers some but not all of the questions directed to it; and, second, the answers are conflicting. Clearly governing the second instance are the words: "so that judgment cannot be pronounced on the findings". It seems to me that those words limit the circumstances in which a judge may act in cases of conflicting answers. In effect, the rule means that it is not in every case where there are conflicting answers that a Court may order a new trial, but only in those cases where, because of the conflicting answers, "judgment cannot be pronounced on the findings."

It was also observed that:[54]

> Even if there is a conflict of the kind described by the judge, can it be said that judgment cannot be pronounced on the findings of the jury? The word

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[48] *Gavin* v. *Kettle Valley Railway (No. 2)*, [1921] 1 W.W.R.488 (B.C.C.A.).
[49] *Ibid.*
[50] *See, e.g.*, *Sutton* v. *Smith*, [1927] 2 W.W.R. 481 (B.C.C.A.).
[51] (1981) 29 B.C.L.R. 6, (B.C.S.C.) *per* McKenzie J. (in chambers).
[52] *Supra*, n. 38.
[53] At 188-9.
[54] At page 191.

"cannot" seems to have been used deliberately. I do not think the word "should" or its equivalent can be used in place of "cannot" so as to enlarge the discretion of the court. Here the jury has answered each of the questions, though it appears two of them have been answered incorrectly. But the answers are clear and unequivocal and judgment can be entered in accordance with them.

Rule 41(6) of the Supreme Court Rules formerly provided as follows:

Waiver of Right to Retrial

(6) If the party who required a jury trial waives his right to a retrial, the Court may pronounce such judgment on the evidence as it thinks just.

That rule was considered in *Cuthbertson* v. *Moryson*,[55] which involved a personal injury action. The jury found the defendant wholly responsible for the accident, but found that the plaintiff had suffered no injuries. The plaintiff purported to waive his right to a retrial under Rule 41(6), and asked the judge to substitute his own verdict for that given by the jury. Spencer J. held that a trial judge could not repudiate a jury's verdict except in limited circumstances, relying on *LeBlanc* v. *Corporation of the City of Penticton*.[56] Rule 41(6) must be read in the light of Rule 41 as a whole. The jurisdiction under that rule arises only when judgment is impossible on the jury finding,[57] where only a partial judgment is possible[58] or where there is no evidence at all upon which those findings are made or they do not provide a foundation for judgment in law. The last two conditions correspond to a trial judge's discretion to reject a perverse verdict and order a retrial.

Rule 41(6) has recently been amended to clarify that it confers jurisdiction only where a trial with a jury would be retried:

(6) Where, for any reason other than the misconduct of a party or his counsel, a trial with a jury would be retried, the court, with the consent of the party who required a jury trial, may continue the trial without a jury.

3. Perverse Verdict

(a) Meaning of "Perverse"

At one time a jury's verdict could be overturned only if it was "perverse" in the sense that the jury, in arriving at its verdict, had conducted itself improperly or was guilty of some moral or legal wrong. That definition of "perverse" is no longer correct:[59]

First, a word about the suggestion that a verdict should be "perverse" before it is set aside. To my mind, this word implies a moral turpitude which, in the present instance, has not been proven to exist. On this point, I would rather accept the statement of Lord Fitzgerald in *Metropolitan Railway Co.* v. *Wright:*

The judgment of the noble and learned Earl who presided in the Court of Appeal imports that a verdict once found is not to be set aside unless it appears to be a verdict perverse or almost perverse. If my recollection does not mislead me, we have departed in this House, in several instances, from the old rule which introduced the element of "perversity", and have substituted for it that the verdict should not be disturbed unless it appeared to be

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[55] [1982] B.C.D. Civ. 3658-02, (B.C.S.C.) *per* Spencer J. (in chambers).

[56] *Supra*, n. 38.

[57] Rule 41(2).

[58] Rule 41(3).

[59] *Vancouver-Fraser Park District* v. *Olmstead*, [1975] 2 S.C.R. 831, 836 *per* De Grandpre J. A verdict is perverse when:

(1) there is no evidence to support it;
(2) it is against the weight of evidence: in *Mechanical and General Inventions Co. and Lehwess* v. *Austin and the Austin Motor Co.*, [1935] A.C. 346, it was held that no distinction should be drawn between grounds (1) and (2) when setting aside a verdict;
(3) it is contrary to law;
(4) it is contrary to the judge's directions to the jury: in *Levy* v. *Milne*, (1827) 12 Moore 418 (Ct. of Common Pleas in term, consisting of four judges) it was held that a jury finding offending (3) or (4) was perverse.

> not only unsatisfactory, but unreasonable and unjust. The question, then, for your Lordships' consideration is whether the evidence so preponderates against the verdict as to shew that it was unreasonable and unjust.

"Perverse" has been defined in a number of different ways. A verdict which does not decide issues of fact, or one which is a finding that in law constitutes no fault, have been characterized as perverse.[60] In *Evenden* v. *Merchants Casualty Insurance Co. (No. 1)*,[61] "perverse" is defined as being altogether against the weight of evidence:[62]

> . . . a perverse verdict is one, for instance, in which it appears that the jury have not confined themselves to the terms of the issue and to the evidence legitimately brought before them, but have allowed extraneous topics to be introduced into the jury box.

In *Geel* v. *Winnipeg Electric Co.*,[63] for example, the jury concluded that the injuries to the plaintiff in a motor vehicle accident were due to the defendant's negligence. The jury's answers indicated that the finding of negligence was based upon the conclusion that the defendant had not had his brakes inspected often enough. The plaintiff had not put that question in issue and, in any event, in the circumstances a failure to inspect was not negligent. The jury's verdict was perverse. A new trial was ordered.

(b) When is a Verdict Perverse?

If there is enough evidence to go to a jury, the jury's verdict is final unless it is perverse.[64] If the jury's verdict is perverse, the proper remedy is a new trial and not a dismissal of the action.[65] In *Zablotny* v. *Levine*,[66] for example, it was said:

> A Judge need not accept every verdict returned by a jury, particularly one which contains a questionable conclusion, because it is the business of the Judge to send into the world, not doubts, but decisions.

Nevertheless, if there is evidence which supports the jury's findings, the court should not interfere with that finding. A verdict which is merely against the weight of evidence or contrary to the opinion of expert witnesses is not perverse[67] and the court cannot send the case to a new jury. Nor can it substitute its own findings for those of the jury.[68] Judges are no better qualified than jurors to appreciate the weight of the evidence bearing upon questions of fact. Therefore, so long as there is some evidence to support the jury's finding, the court is not at liberty to reject it.[69]

In *Peterson* v. *Spilde*,[70] P and the defendant were involved in a motor vehicle collision. P was killed in the accident. Evidence showed that she had a blood alcohol reading of .09 at the time of the accident. The defendant was a police constable who was in pursuit "of an actual or suspected violator of the law" at speeds of up to 70 m.p.h. His vehicle was marked by a flashing red light, but he was not using a siren. He entered an intersection without stopping at the stop sign which protected a through street, striking P, who was travelling along that through street. The jury apportioned fault 67% upon P and 33%

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[60] *Watson* v. *Fitzpatrick*, *supra*, n. 40.

[61] [1935] 2 W.W.R. 484 (Sask. C.A.).

[62] *Ibid.* at 490.

[63] [1932] 3 W.W.R. 49, [1932] A.C. 690 (P.C.).

[64] *Evenden* v. *Merchants Casualty Insurance Co. (No. 1)*, *supra*, n. 61; *Geel* v. *Winnipeg Electric Co.*, *ibid.*

[65] *Ibid.*

[66] [1981] B.C.D. Civ. 2632-01 (B.C.S.C.) *per* McKenzie J.

[67] *Ibid.*

[68] *Lawton* v. *Winnipeg*, [1928] 3 W.W.R. 354 (Man. C.A.); *Peterson* v. *Spilde*, *supra*, n. 34.

[69] *Peterson* v. *Spilde*, *ibid.*; *Oliver* v. *Kemp*, [1929] 4 D.L.R. 1045, [1929] 3 W.W.R. 369, 38 Man. R. 310 (C.A.); *Thompson & Alix, Ltd.* v. *Smith*, *supra*, n. 16.

[70] *Ibid.*

upon the defendant police constable. The jury based its finding of P's negligence on the blood alcohol content of .09. Notwithstanding that the apportionment of liability does not appear to be wholly reasonable, the trial judge held that he had no jurisdiction to reject it since there was some evidence in its support.

The case of *St. Amour* v. *Ottawa Transport Commission*,[71] involved a collision between a motor vehicle and a streetcar. The jury found that the defendant had been negligent, in that "[t]he defendant Stoat failed to stop his tram in time to avoid the collision." The fact of the defendant's failure to stop was not in issue. The judge gave the jury further directions, asking them to state the act or omission that constituted negligence. For example, the motorman might have failed to keep a proper lookout; he might not have had the car in proper control; he might not have applied the brakes when he should have; the tram might have been moving at an excessive rate of speed. The jury returned another unsatisfactory verdict. It was redirected and returned a third verdict identical to the first. The trial judge ordered a new trial.

The Court of Appeal held that the jury, implicitly, did not find negligence and dismissed the action. Another reasonable course would have been to rule that the jury's finding, read in the light of the issues presented by the pleadings, the evidence and the judge's charge to them, was one they could reasonably make and ought to be respected. That was the conclusion of Schroeder J.A., who dissented.[72]

We mentioned *Kraus* v. *Woodward Stores Ltd.*[73] earlier. In that case a clerk collided with a customer, injuring her. The jury held that the clerk had been negligent. The negligence consisted in failing to give the right of way to a customer. Clyne J. concluded that the jury had invented a fault unknown to law and that it was his duty to reject its verdict. The Court of Appeal directed a new trial.[74] The majority held that, although on the evidence a jury properly instructed might find for the plaintiff, in this case they had "embarked on a perverse adventure of their own." They never did decide the real issues of fact in the case. O'Halloran J.A. dissented. He thought judgment should be entered for the plaintiff. The jury was not creating a new fault at law. They were using language ambiguously. O'Halloran J.A. cited numerous authorities on interpreting a jury's verdict. On the primary issue of whether the clerk was negligent, the jury did make a finding, although it was ambiguously phrased.

A result more consistent with Mr. Justice O'Halloran's dissent in *Kraus* was reached by the British Columbia Court of Appeal in *Burbank* v. *Polacco*.[75] Burbank concerned a motor vehicle collision. Two cars, travelling in different lanes but in the same direction on the Lions's Gate Bridge, collided. One car veered into the lane of the other, but evidence was conflicting and uncorroborated. Toy J. instructed the jury that they could not find that both parties were innocent of negligence. Nevertheless, the jury returned a verdict finding that neither party was negligent. Toy J. discharged the jury. There was no evidence of any other contributing factor for the motor vehicle collision. Toy J. concluded, therefore, that the jury must have found some extraneous cause and rendered a decision they were not entitled to under the directions given. He ordered a new trial.

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[71] [1957] O.W.N. 367 (C.A.).

[72] Relying on *British Columbia Electric Co.* v. *Dunphy*, (1919) 59 S.C.R. 263, [1919] 3 W.W.R. 1076, 50 D.L.R. 264.

[73] (1953) 8 W.W.R. 358 (B.C.S.C.).

[74] (1953) 10 W.W.R. 385 (B.C.C.A.), *aff'd.* [1954] 3 D.L.R.321 (S.C.C.).

[75] *Supra*, n. 45.

That decision was reversed on appeal. The primary issue for the jury was whether the defendant was negligent. The finding that neither party had been negligent was a clear finding on the primary issue. The Court of Appeal dismissed the action.

It would appear that the test of whether a jury's verdict is "perverse" is nebulous. Jury verdicts can be characterized in several ways. As a result, consistency with respect to reviewing jury decisions is difficult to establish. Moreover, the ability to correct a perverse verdict by ordering a new trial leads inevitably to increased costs for the litigants. If the trial judge accepts the jury's verdict and it is then appealed, in many cases the Court of Appeal's powers to correct the error are limited to directing a new trial. A recent decision of the British Columbia Court of Appeal, *LeBlanc* v. *Corporation of the City of Penticton*,[76] demonstrates graphically the problems that can arise from the trial judge's limited jurisdiction to review a jury's verdict.

In *LeBlanc*, the plaintiff commenced a personal injury action arising from a swimming accident which rendered him a quadriplegic. The jury found the defendant negligent for not posting warning signs against diving and the plaintiff negligent for having consumed a glass of wine before diving and for not first checking the depth of the water. It assigned liability as 95% to the plaintiff, 5% to the defendant. The trial judge felt that the jury gave too much weight to the plaintiff's consumption of wine. In determining quantum, the jury made no award for initial costs, nor for costs of future care (clearly in error). Total damages were set at $275,000, of which the plaintiff, now a quadraplegic, would receive only $13,750.

The trial judge discharged the jury. He rejected its verdict on both apportionment of liability and quantum of damages and entered judgment according to his own view of the evidence. He set liability at 40% to the plaintiff, 60% to the defendant. He corrected the errors the jury made with respect to quantum and arrived at a figure of $1,036,088, 60% of that award, $622,000, to be paid to the plaintiff. One reason which prompted this course was that to give judgment based upon the amount found by the jury "would be a pointless exercise in time and money"[77] since the Court of Appeal had only jurisdiction to order a new trial where damages assessed were inordinately low.

One aspect of the case could not figure in the Court of Appeal's judgment, nor that of the trial judge's. The jury was under the impression that, notwithstanding its apportionment of liability, the plaintiff would be entitled to the full damage award. That might explain the peculiar figures the jury selected when computing that award. A member of the jury swore an affidavit to that effect. The evidence of the error, however, was inadmissible. This is a case where trial by jury had gone horribly wrong. It prompted a full review by the Court of Appeal of the jurisdiction of a trial judge to vary or reject a jury award and of the jurisdiction of a Court of Appeal to review a jury award.

The case was tried in two parts. The first phase of the appeal concerned whether the trial judge erred in law in rejecting the jury's verdict and entering judgment according to his view of the evidence. The second phase of the appeal was brought by the plaintiff on the findings with respect to liability and quantum after the Court of Appeal concluded that the trial judge had erred.

In phase one of the appeal, Taggert and Lambert JJ.A. concluded that in the circumstances the trial judge erred in rejecting the jury's verdict. The

[76] *Supra*, n. 24.
[77] (1980) 19 B.C.L.R. 121, 125.

jury's verdict was restored. Carrothers J.A. dissented on the issue of quantum of damages:[78]

> With respect, I agree with the reasoning of the trial judge that there is, on the face of it, fundamental error and conflict in these particular answers (B.3. and B.4.), rendering it impossible to give a quantum judgment based on the jury's entire findings (nor advisable to give a quantum judgment in part) and indicating a new trial to be in order.

(c) Interpreting a Jury's Verdict

If it is possible to support a jury verdict by any reasonable construction, it should be done.[79] The language used by a jury should not be construed too narrowly or too critically.[80]

(d) Jurisdiction to Refuse to Accept a Perverse Verdict

Under the British Columbia Supreme Court Rules, 1961, two rules were thought to support the trial judge's power to reject a perverse verdict.[81] These were O. 36 r. 39, mentioned earlier, and O. 40, r. 10, which read as follows:

> **10.** Upon a motion for judgment, or upon an application for a new trial, the Court may draw all inferences of fact, not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit.

These two rules were omitted from the 1976 Supreme Court Rules. The effect of that omission was considered in *Force* v. *Gibbons*:[82]

> When the 1976 rules were promulgated both M.RR. 559 and 568 of the British Columbia Supreme Court Rules, 1961, were omitted. In place of M.R. 463 the following rule appears as R. 41(1), British Columbia Supreme Court Rules, 1976: "(1) No application for judgment is necessary except where an enactment or these rules otherwise provides."
>
> As a consequence of these rule alterations counsel for the plaintiff submits there is no longer any discretion in this court to grant or refuse judgment following a jury verdict. It follows automatically. I disagree. In the first place, a jury verdict and a court judgment are two different kinds of animals. They even have different names. Second, if any jury verdict became a judgment without further consideration by a judge many issues would pass unresolved.

One of those issues which would go unresolved if a motion for judgment was not required was whether the jury's verdict was perverse. Bouck J. concluded that the court's discretion to grant or refuse judgment following a jury verdict did not depend upon the Supreme Court rules:[83]

> The 1976 Supreme Court Rules are not a complete code of procedure in themselves but continue to be the servants and not the masters of the proceedings they codify: *Lavaris* v. *MacMillan Bloedel Ltd.* (1977), 3 B.C.L.R. 308 at 319, 81 D.L.R. (3d) 197.

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[78] *Supra*, n. 24 at 201.

[79] *Jamieson* v. *Harris*, (1905) 35 S.C.R. 625; *British Columbia Electic Co.* v. *Dunphy*, (1919) 59 S.C.R. 263, [1919] 3 W.W.R. 1076, 50 D.L.R. 264; *Wabash Railway Co.* v. *Follick*, (1920) 60 S.C.R. 375; *Grinnell Co.* v. *Warren*, [1937] S.C.R. 353, *affirming* [1936] 2 W.W.R. 600, 50 B.C.R. 512; *Pronek* v. *Winnipeg, Selkirk & Lake Winnipeg Railway Co.*, [1932] 3 W.W.R. 440, [1933] A.C. 61 (P.C.); *Fick* v. *British Columbia Electric Ry. Co.*, [1951] 1 D.L.R. 81 (S.C.C.), *rev'g.* [1950] 1 W.W.R. 728; *Montreal Tramways Co.* v. *Lindner*, [1939] S.C.R. 405.

[80] *Pronek*, *ibid.*; *Grinnell*, *ibid.*; *Thomas* v. *Attorney General of British Columbia*, [1973] 2 W.W.R. 228 (C.A.). *See also*, *Kerr* v. *T. Eaton Co.*, (1959) 27 W.W.R. 115 (Sask. C.A.); *Fick* v. *British Columbia Electic Ry.*, *ibid.*; *Wabash Ry. Co.* v. *Follick*, *ibid.*; *Bloudoff* v. *Canadian National Railways*, [1928] 2 W.W.R. 519, 23 Sask. L.R. 11, 34 C.R.C. 421; *Hamer* v. *Canadian National Railways*, [1938] 2 W.W.R. 161 (Sask. C.A.).

[81] *See*, *e.g.*, *Watson* v. *Fitzpatrick*, *supra*, n. 40.

[82] *Supra*, n. 34 at 148-9 *per* Bouck J.

[83] *Ibid.* at 150.

In *LeBlanc* v. *Corporation of the City of Penticton*,[84] the British Columbia Court of Appeal confirmed that the new rules did not alter a trial judge's discretion to reject a jury verdict:[85]

> Having read and re-read the 1976 Rules and compared them with the 1961 Rules and with the general principles governing trial judges in their acceptance or rejection of juries' verdicts, to which I have referred above, I have reached the conclusion that the new rules do not restrict the ability of a trial judge to reject the verdict of a jury, but that the principles I have endeavoured to set out continue to have application and must be applied in conjunction with the provisions of R. 41. Thus, in my consideration of the reasons given by the trial judge for rejecting the jury's verdict, I propose to be guided by the principle that a trial judge may refuse to accept the verdict of a jury where he concludes that there is no evidence to support the findings of the jury, or where the jury gives an answer to a question which cannot, in law, provide a foundation for judgment . . .

(e) Jurisdiction to Vary Quantum of Damages

It is the function of the jury and not of the judge to determine the amount of damages.[86] What might constitute appropriate damages must not even be suggested to the jury. In *Force* v. *Gibbons*, it was said:[87]

> In this province a civil jury is given no particular guidance as to what dollar value of general damages it ought to award an injured plaintiff. The matter is at large. Neither the judge nor counsel are permitted to suggest a figure. The reason for this is to prevent a bidding war between the parties. Better to let the jury decide in its collective wisdom what is the right amount than to have an auction process. Moreover, if a judge were to recommend the appropriate sum as being somewhere between $5,000 to $8,000, then the jury might be so influenced as to make its award accordingly. In that event the benefit of trial by jury would be lost.
>
> It is also felt that if the judge has the right to suggest a sum then counsel should be given the same advantage. In the above example, defence counsel might say to the jury that its verdict should be no more than $500 because the injuries were rather minor. Counsel for the plaintiff may have an entirely different point of view, and he may honestly submit that the award should be no less than $75,000. Given such a possible wide swing, the jury would be left with very little assistance. As a result higher authority has decided it is better to say nothing about amount . . .

Just as a judge may not reject a jury's finding with respect to liability if there is some evidence to support it, he may not reject a jury's determination of quantum if there is some evidence in its support.[88] In *Force* v. *Gibbons*, evidence on loss of future income was weak (the plaintiff's evidence consisted of two witnesses who ascribed the plaintiff's diminished prospects not to her injuries but to defects in character) and no evidence was led concerning the present value of that loss. The trial judge directed that any award under that heading should be nominal. Nevertheless, the jury awarded $24,000 for loss of future income. Bouck J. concluded that he could not reject the jury's determination of damages:[89]

> In this case the jury returned with an answer responsive to the question it was asked. There is nothing ambiguous about the figure "$24,000". In reply the defendant says the amount is unsupported by the evidence, particularly the lack of actuarial evidence. Again this is a matter of sufficiency of evidence instead of no evidence at all and so that branch of the argument must fail.
>
> The award of $24,000 may be perverse in the sense that it is not only unsatisfactory but also unreasonable and unjust; however, the power to reduce it

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[84] *Supra*, n. 24.

[85] *Ibid.* at 189.

[86] *Fournier* v. *Canadian National Railways*, [1927] A.C. 167, 95 L.J.P.C. 177; *Muis* v. *Alekson*, *supra*, n. 38.

[87] *Force* v. *Gibbons*, *supra*, n. 34 at 150 *per* Bouck J.; *see also*, *Gray* v. *Alanco Developments Ltd.*, [1967] 1 O.R. 597, 61 D.L.R. (2d) 652 (C.A.); *Ward* v. *James*, [1966] 1 Q.B. 273, [1965] 1 All E.R. 563 at 575 (C.A.) (Denning M.R.); but *also see Byron* v. *Williams*, [1968] S.C.R. 314 at 321, 67 D.L.R. (2d) 111.

[88] *Watson* v. *Fitzpatrick*, *supra*, n. 40.

[89] *Supra*, n. 34 at 152.

> lies with the Court of Appeal and not with a judge of this court: *Collins* v. *B.C. Motor Transportation Ltd.*, 5 W.W.R. (N.S.) 508 at 514, [1952] 4 D L.R. 439 (B.C.C.A.) . . .
>
> . . . If there is some evidence to support a jury's verdict and it is not ambiguous or otherwise wrong in law then judgment must follow in accordance with the terms of the verdict. This is so even though any assessment of damages contained in the verdict may be more or less than what a judge might have otherwise awarded.

If the damage award in *Force* v. *Gibbons* was not perverse, one might wonder if any damage award could be perverse and justify requiring a new trial. Ruttan J. describes what might constitute a perverse damage award:[90]

> I can contemplate a case where the award could be so extravagantly low that the jury must have erred in applying principles of quantum, or erred by some omission or calculation. Such was not the case here. The issue was pain and suffering and duration of disability and depended in large part on the subjective evidence of the parties themselves. The objective medical evidence could not fully confirm the extent of the complaints and I did instruct the jury they must in large measure make their finding based on the evidence of the plaintiffs. The amount of the award could be a reflection of the weight attached to the evidence of the plaintiffs, and the jury may have concluded the plaintiffs were malingering or exaggerating.
>
> It is clear therefore that to refuse to accept an award I am invading the province of the jury and substituting my opinion on the credibility of the witnesses as well as the value of their loss.

In that case, plaintiff's counsel submitted that the jury's award was inordinately low. Ruttan J. discussed the trial judge's discretion under O. 40 r. 10. He concluded that a trial judge's discretion under that rule is restricted to entering judgment consistent with the findings of the jury or refusing to accept a perverse verdict.

In *Peterson* v. *Spilde*, mentioned earlier, the plaintiff submitted that the court could redress a verdict in which the apportionment of liability was unjust by varying the quantum of damages, relying upon *Burt* v. *Bridge Creek Estate Ltd.*[91] Munroe J. held that that case was authority only for the proposition that a trial judge may correct an obvious error or misunderstanding on the part of jurors who, in assessing damages, failed to disregard their apportionment of liability.

In *MacDougall* v. *Vandewater*,[92] the plaintiff objected to the jury's award on the ground that it was inordinately low. He opposed a motion for judgment on the basis that the award was unreasonable and unjust and submitted that the trial judge could alter the award and enter judgment for an appropriate amount.[93] Craig J. held that he had no jurisdiction to reject an award for damages.

In *O'Dwyer* v. *Buster's Auto Towing Services Ltd.*,[94] it was said in *obiter dicta* that the court is not *functus officio* after a jury verdict and has jurisdiction to consider whether the award was unreasonable.[95] Nevertheless, Gould J. declined to set aside the extremely generous jury award of damages made in that case.

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[90] *Watson* v. *Fitzpatrick*, *supra*, n. 40, 760-1 (B.C.S.C.).

[91] (Unreported B.C.S.C. decision, *per* Gregory J) 1971, No. 3942/58.

[92] [1976] B.C.D. Civ. "Practice—Jury Trial."

[93] Counsel relied on the following authorities: *Vancouver-Fraser Park District* v. *Olmstead*, (1975) 2 S.C.R. 831; *Schmidtke* v. *Chouan* (Unreported B.C.S.C. decision) Van. Reg. No. 34905, [1976] B.C.D. Civ. "Practice—Jury Trial"; *Haynes* v. *Canadian Pacific Railway*, (1972) 6 W.W.R. 296.

[94] (Unreported B.C.S.C. decision, *per* Gould J.) Van. Reg. No. 43627, March 10, 1978; [1978] B.C.D. Civ. "Practice—Jury Trial".

[95] *See also Ford* v. *Laird*, (Unreported B.C.S.C. decision), April 18, 1975.

D. Summary

The trial judge's discretion to review and correct a verdict given by a jury is limited. Primarily, the limitations on this discretion are due to the separate functions performed by judge and jury. A trial judge sitting without a jury is both the trier of fact and the trier of law. If the trial is by jury, the jury is the sole trier of fact.

A trial judge may remove the case from the jury if there is no evidence to go before it, or if the evidence adduced at trial is insufficient to find in favour of one party or the other. If there is some evidence, it must go to the jury. In that case, if the judge disagrees with the jury's verdict, he may redirect the jury. If the verdict the jury returns is still unsatisfactory, then he may direct a new trial on the basis of a mistrial (if the jury's verdict is incomplete or parts of it conflict). Under the Supreme Court Rules, the trial judge may grant judgment even on an incomplete verdict, but then a new trial must take place to resolve the remainder of the dispute. A trial judge may also direct a new trial if the verdict is perverse. Usually there will be some evidence to go to the jury and very seldom can it be established that reasonable men could not have come to the verdict the jury reached. Consequently, if the jury has come to an unjust verdict, it will usually be the subject of an appeal. In the next chapter we will examine the powers of a Court of Appeal to review jury awards.

CHAPTER III THE ROLE OF THE COURT OF APPEAL

A. Introduction

The jurisdiction of the Court of Appeal to review a trial judgment varies depending on whether the appeal is from a judge alone or from a judge sitting with a jury. Its ability to review a jury verdict is significantly more restricted than if the finding were that of a judge. A finding of fact by a judge does not stand on the same footing as a finding by a jury and, where the question depends not upon the credibility of the witnesses, but upon the proper inference to be drawn from the admitted facts, the original tribunal is in no better position than the appellate tribunal.[1]

B. Appeal from the Order of a Judge Alone

It is the duty of the appellate court to review the findings of fact made by a judge sitting alone.[2] Even should the appeal turn on a question of fact, if on a full consideration the court concludes that the trial judge was wrong, it should overrule him,[3] although it is wrong for an appellate court to set aside a judgment where the only point in issue is the interpretation of the evidence as a whole:[4]

> . . . it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly.

The term "rehearing" has been used to describe the function of the Court of Appeal[5] and was used in the former Court of Appeal rules to describe the manner in which an appeal was to take place.[6] However, that term, taken literally, is too strong and incorrect.[7] Where credibility is not in issue, an appellate court may review the findings of fact by a trial judge that were based on a failure to consider relevant evidence or on a misapprehension of evidence,[8] but the Court of Appeal must not overlook the trial judge's advantage in seeing and hearing witnesses and being able to determine their credibility.[9] In *McQuillen* v. *White*,[10] for example, it was[11] observed:

> . . . while there is no doubt that the findings of fact of a trial Judge are open to review by a Court of Appeal to an extent not open in a case of a finding of a jury, still the finding of fact of a trial Judge will not be lightly disturbed . . .

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[1] *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704 (C.A.); *Montgomerie & Co.* v. *Wallace James*, [1904] A.C. 73 (H.L. (Sc.)); *Dominion Trust Co.* v. *New York Life Insurance Co.*, [1919] A.C. 254 (P.C.); *see also Merritt* v. *Hepenstal*, (1895) 25 S.C.R. 150, 152 (S.C.C.); *Jones* v. *Hough*, (1879) 5 Ex. D. 115, 122 (C.A.), *per* Bramwell L.J.:

> A great difference exists between a finding by the judge and a finding by the jury. Where the jury find the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like.

[2] *Annable* v. *Coventry*, (1912) 46 S.C.R. 573, 2 W.W.R. 816, 5 D.L.R. 661; *Cities Service Oil Co.* v. *Rubel*, (1931) 66 O.L.R. 475, [1931] 2 D.L.R. 183 (C.A.).

[3] *Ibid.*

[4] *Mersey Docks and Harbour Board* v. *Proctor*, [1923] A.C. 253, 258-9, (H.L.) *per* Viscount Cave L.C.; *see also Metivier* v. *Cadorette*, [1977] 1 S.C.R. 371, 8 N.R. 129; *Jaegli Enterprises Ltd.* v. *Ankenman*, (1981) 124 D.L.R. (3d) 415 (S.C.C.); *Stein* v. *The Ship "Kathy K"*, (1975) 62 D.L.R. (3d) 1 (S.C.C.); *Lewis* v. *Todd*, (1980) 115 D.L.R. (3d) 257 (S.C.C.).

[5] *Annable* v. *Coventry*, *supra*, n. 2.

[6] *The Court of Appeal Rules*, 1959:

> 4(1) All appeals to the Court shall be by way of rehearing and shall be brought by notice of appeal in a summary way.

[7] *Schreiber Bros. Ltd.* v. *Currie Products Ltd.*, [1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1, 31 N.R. 335.

[8] *Ibid.*

[9] *Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 243 H.L.); *Metivier* v. *Cadorette*, *supra*, n. 4; *Prudential Trust Co.* v. *Forseth*, [1960] S.C.R. 210, (1959) 30 W.W.R. 241, 21 D.L.R. (2d) 587; *The Phoenix Insurance Co.* v. *McGhee*, (1890) 18 S.C.R. 61.

[10] [1937] O.W.N. 571 (C.A.).

[11] *Ibid. per* Masten J.A. at 574, dissenting.

> It is entirely possible that the trial Judge in preferring the evidence of Mrs. White and Mrs. Tilley to that of Jones may have been influenced by their demeanour in the witness box.

It would appear, therefore, that in order to make a finding of fact unappealable, a trial judge need only expressly base it upon the credibility of the witnesses. Even if the trial judge does not take that course, an appellate court should not set aside a trial judgment if the only point in issue is the interpretation of the evidence as a whole, unless there is "palpable and overriding error."[12]

In *Burnett* v. *Christie Brown & Co.*,[13] Burnett's car stalled at night on a highway. It was snowing. He left his car to warn an oncoming vehicle, driven by Card. Card didn't see Burnett or the car, and struck Burnett first, then the car. Burnett was killed. There was some doubt whether Burnett's car's headlights were on. The trial judge did not resolve that issue:

> . . . but if it were so necessary [to decide that issue] I would be inclined to accept the testimony of Mrs. Maguire [a passenger in Burnett's car] in preference to that of Card, whose testimony on the whole did not impress me with his credibility.

On appeal, the Ontario Court of Appeal, *per* Gillanders J.A. said:[14]

> It is true that the trial judge has not in terms made a finding that the lights were on or off. In an appeal from the judgment of a judge sitting without a jury the appellate Court may feel free to make up its own mind and draw what inferences it may think proper from undisputed facts or the evidence accepted by the trial judge, but it must be borne in mind that this does not mean that the Court of Appeal should not attach the greatest weight to the trial judge's selection and rejection of evidence based on credibility. In *Powell et ux.* v. *Streatham Manor Nursing Home*, [1935] A.C. 243 at 255, Lord Atkin restates what in effect has been frequently pointed out:—
>
> > I wish to express my concurrence in the view that on appeals from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial judge. But the Court is still a Court of Appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognize the onus upon the appellant to satisfy it that the decision below is wrong; it must recognize the essential advantage of the trial judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an appellate Court can never recapture the initial advantage of the judge who saw and believed.

Gillanders J.A. concluded that if the issue of the lights must be resolved, it should be resolved as the judge indicated, in accordance with Mrs. Maguire's testimony. Laidlaw J.A. agreed:[15]

> . . . I think it is not permissible for this Court to make findings or draw inferences of fact from evidence which was rejected by the trial judge. He has had the best known means of appraising the testimony by observation of the witnesses, the manner in which the evidence was given, the hearing of the spoken words and the indefinable feeling of weight or otherwise which ought by his experience and training to be given to it. No infringment upon the judgment of a trial judge as to the credibility of witnesses should be allowed.On the contrary the position of advantage of the trial judge should be fully recognized and preserved.

Under section 9 of the *Court of Appeal Act*, the Court has power to give the decision which in its opinion the trial judge ought to have given. That power is used reluctantly:[16]

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[12] *Supra*, n. 4.

[13] [1946] O.W.N. 30 (C.A.).

[14] At 31-2.

[15] At 34.

[16] *Put* v. *Illinois Publishing and Printing Company*, [1929] 2 W.W.R. 14, 16-17 (Sask. C.A.) *per* Martin J.A.

> The Court, however, must act upon well understood principles when considering whether the amount awarded should be increased or otherwise, and unless it appears that the trial Judge failed to take into consideration some element of damage which he should have considered, I do not think his decision should be disturbed.

C. Appeal from a Jury Verdict

1. Where There is Some Evidence

The functions of an appellate court on an appeal from the findings of a jury differ significantly from the functions it exercises when reviewing the order of a judge.[17] If there is evidence proper for submission to a jury, a verdict based upon it ought not to be disturbed unless the court concludes that reasonable men could not have found as the jury did.[18] The weighing of evidence to determine whether the jury acted reasonably and judicially in reaching its verdict is the jurisdiction of the Court of Appeal, not of the trial judge.[19] In *McCannell* v. *McLean*,[20] Duff C.J.C. said:[21]

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. That is the principle on which this Court has acted for at least thirty years to my personal knowledge and it has been stated with varying terminology in judgments reported and unreported . . . This, as we have observed, is the principle on which this Court has always acted in dealing with such questions, but the principle is so completely settled and so well known that in many cases it has not been considered necessary to state it in terms.
>
> There being some evidence for the jury, that is to say, the evidence being of such a character that the trial judge could not properly have withdrawn the issue from the jury, the question whether, in such circumstances, a jury, considering the evidence as a whole, could not reasonably arrive at a given finding may be, it is obvious, a question of not a little nicety; and the power vested in the court of appeal to set aside a verdict against the weight of evidence in that sense is one which ought to be exercised with caution; it belongs, moreover, to a class of questions in the determination of which judges will naturally differ, and, as everyone knows, such differences of opinion do frequently appear.

In *Kleinwort, Sons, & Co.* v. *Dunlop Rubber Co.*, Lord Loreburn L.C. said:[22]

> To my mind nothing could be more disastrous to the course of justice than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some plain error of law, which the Court believes has affected the verdict, or some plain miscarriage, before it can be disturbed.

This jurisdiction, although broader, in part overlaps the trial judge's discretion to reject a perverse verdict and order a new trial, discussed in the previous chapter. A trial judge may reject a verdict which is altogether against the

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[17] *The Phoenix Insurance Co.* v. *McGhee*, *supra*, n. 9; *Jones* v. *Hough*, *supra*, n. 1.

[18] *Ibid. Metropolitan Railway Company* v. *Wright*, (1886) 11 App. Cas. 152 (H.L.); *Rollins* v. *I.C.B.C.*, [1983] B.C.D. Civ. 3658-03 (B.C.C.A.).

[19] *Le Blanc* v. *The Corporation of the City of Penticton*, (1981) 28 B.C.L.R. 179, 203 (B.C.C.A.); *McCannell* v. *McLean*, [1937] S.C.R. 341, [1937] 2 D.L.R. 639; *Vancouver-Fraser Park District* v. *Olmstead*, [1975] 2 S.C.R. 831, 51 D.L.R. (3d) 416, 3 NR. 326; *see also Reynolds* v. *Canadian Pacific Railway Co.*; *Craig* v. *Canadian Pacific Railway Co.*, [1927] S.C.R. 505, 33 C.R.C. 55, [1927] 3 D.L.R. 888; and *Gray Coach Lines* v. *Payne*, [1945] S.C.R. 614, [1945] 4 D.L.R. 145.

[20] [1937] S.C.R. 341, [1937] 2 D.L.R. 639.

[21] *At* 343 and 345; cited with approval in *Vancouver-Fraser Park Dist.* v. *Olmstead*, *supra*, n. 19; *see also C.N.R.* v. *Muller*, [1934] 1 D.L.R. 768, 41 C.R.C. 329 (S.C.C.); *Metropolitan Ry. Co.* v. *Wright*, *supra*, n. 18; *Mechanical & Gen. Inventions Co. Ltd.* v. *Austin & Austin Motor Co. Ltd.*, [1935] A.C. 346 (H.L.); *Commissioner for Railways* v. *Quinlan*, [1964] A.C. 1054, [1964] 1 All E.R. 897 (P.C.); *British Railways Board* v. *Herrington*, [1972] A.C. 877, [1972] 1 All E.R. 749 (H.L.).

[22] (1907) 23 T.L.R. 696 at 697, 97 L.T. 263 (H.L.); *see also Duthie* v. *British Columbia Electric Ry. Co.*, [1924] 2 W.W.R. 81 (B.C.C.A.); *Commissioner for Railways* v. *Brown*, (1887) 13 App. Cas. 133 (P.C.).

evidence, is based upon considerations extraneous to the dispute, fails to resolve issues put to the jury or which does not amount to a fault recognized at law. The Court of Appeal may reject a verdict which, on the evidence, is wholly unreasonable.

In *Reynolds* v. *C.P.R.*; *Craig* v. *C.P.R.*,[23] the plaintiff's motor vehicle was struck by a train at a crossing. There was some doubt whether (and if so, when) the train gave the warning signal required by statute. The Ontario Court of Appeal held that the evidence was overwhelming that the whistle was blown and reversed the verdict based on the jury's findings. The Supreme Court of Canada disagreed. The evidence was not so overwhelming as to justify reversing the jury. The jury also held that the defendant was negligent in leaving "supporting walls" too high, which, it concluded, obstructed the view of people crossing the track. The judgment is unclear as to what was meant by "supporting walls." In any event, on the evidence, a natural hill, and not the construction, obstructed vision. That finding, therefore, did not support negligence on the part of the defendant. Since the finding may have affected the jury's verdict on quantum, a new trial was ordered. An unobjectionable finding will not support a verdict if another is objectionable, since the latter may have influenced the jury in reaching the former.[24]

In *Lumsden* v. *Martin*,[25] a bus passenger was injured in a collision between the bus and another vehicle at an uncontrolled intersection. The bus had the right of way. The jury found that the driver of the motor vehicle was not negligent. The Ontario Court of Appeal directed a new trial. The verdict was not one that reasonable men might have come to. The jury had failed to perform their duty. *Chrysler* v. *Yacketti*,[26] concerned an action by a passenger on a streetcar against the company owning the streetcar. The passenger, after stepping down from the street car, was struck by an oncoming vehicle. The jury found that the passenger was not contributorily negligent. The Court of Appeal held that the passenger was. A new trial was ordered.

Similarly, in *Curley* v. *Ottawa Electric R. Co.*,[27] a motorist entered a through street from a side street and collided with a streetcar that had the right of way. The jury found for the motorist. The Court of Appeal reversed that verdict and dismissed the action. No reasonable jury doing their duty could have come to that verdict. That decision was affirmed on appeal to the Supreme Court of Canada.

An appellate court's jurisdiction to review a jury award is used reluctantly. It is not the function of the Court of Appeal or the Supreme Court of Canada to review the jury's findings of fact. Its findings are conclusive unless wholly unreasonable, in which case the jury cannot be said to have been acting judicially.[28]

In *McLean* v. *McCannell*,[29] for example, the defendant left his truck on the side of the road. If the defendant had pushed it across the road, it would have been out of the path of traffic. The plaintiff, driving at night, struck the defendant's truck. The jury found the defendant negligent in not having pushed the truck across the road. They found the plaintiff had not been negligent. Although, on the facts of the case, the finding that the plaintiff was

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[23] *Supra*, n. 19.

[24] *See also Mechanical and General Inventions Co.* v. *Austin*, *supra*, n. 21.

[25] [1938] O.W.N. 201 (C.A.).

[26] [1938] O.W.N. 303 (C.A.).

[27] [1947] 3 D.L.R. 576 (S.C.C.).

[28] *C.N.R.* v. *Muller*, [1934] 1 D.L.R. 768 (S.C.C.); *Coca-Cola Company of Canada Ltd.* v. *Forbes*, [1942] S.C.R. 366.

[29] [1938] O.R. 37, *aff'd*. [1937] S.C.R. 341.

not even contributorily negligent was peculiar, the Ontario Court of Appeal and the Supreme Court of Canada concluded that they could not vary the jury's verdict.

An appellate court's jurisdiction to review a jury award is limited by the principle that a jury verdict should not be subjected to rigorous critical review. If a jury's findings can be supported on a reasonable view of the evidence, they are conclusive. Effect must be given to them.[30] The standard of "wholly unreasonable" is difficult to apply, particularly when the evidence considered by the jury is conflicting. Time and again appeal courts are divided on whether a jury verdict should be set aside. The numerous cases in which appellate justices are moved to dissent may be attributed, in part, to the difficulties that arise in any finding of fact. Reasonable men will disagree.

In *Laporte* v. *C.P.R.*,[31] for example, the plaintiff's motor truck was struck while crossing railway tracks. Evidence conflicted as to whether (and when) the train gave the warning signal required by statute. The jury found that the defendants were negligent and the plaintiff contributorily negligent. The plaintiff's negligence consisted in heedlessly crossing the line without taking proper precautions. Although it is the province of the jury to weigh conflicting evidence, the Quebec Court of Appeal reversed the jury's verdict on the ground that no reasonable jury could have made that finding. The Supreme Court of Canada, however, restored the jury's verdict.

In *Odlum & Sylvester* v. *Walsh*,[32] the jury found that the defendant's negligence had not caused a motor vehicle collision, although there was evidence that the defendant had been travelling at an excessive rate of speed. The Ontario Court of Appeal disagreed. The Supreme Court of Canada restored the jury's verdict.

While the courts are reluctant to vary a jury verdict where there is some evidence to support it, an appellate court cannot divest itself of its proper function by saying that the jury is infallible and its findings entirely sacrosanct.[33] In *Armstrong* v. *Houston*,[34] Masten J.A. observed that application of the rule that the appeal court must not fail to carry out its intended role, even in a review of a jury's findings, was open to judicial discretion. He concluded, however, that:[35]

> . . . a careful study of the recent decisions of the Supreme Court of Canada leads to the conclusion that in Canada, as a matter of practice, the right to interfere with the findings of the jury has been confined to narrow limits . . . [and] the application of the well-settled rule respecting non-interference by an Appellate Court with the finding of a jury has elevated the sacrosanct character of the jury's findings to a higher pitch than formerly existed . . .

Although the cases demonstrate that appellate courts will reverse jury verdicts, as a matter of policy very seldom will courts interfere with a jury's findings notwithstanding that the result may be unjust. Middleton J.A., for example, has observed:[36]

> So long as the jury system prevails there must be many cases in which a jury finds upon the evidence facts which do not at all commend themselves to the judicial mind. In these cases the question is not at all what a Judge would or should have done upon the evidence, not what the Court of Appeal should do had the finding of fact been by a Judge, but the question is whether the jury's finding are

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[30] *Metropolitan Ry. Co.* v. *Wright*, *supra*, n. 18.

[31] [1924] S.C.R. 278.

[32] [1939] 2 D.L.R. 545 (S.C.C.).

[33] *Armstrong* v. *Houston*, [1936] O.W.N. 139 (C.A.).

[34] *Ibid.*

[35] *Ibid.* at 145.

[36] *Toronto Transportation Com'n.* v. *Whittleton*, [1939] 3 D.L.R. 721, 722-23 (Ont. C.A.).

> as put by the defendant "such that no reasonable or honest jury could have made." The Appellate Court is often tempted to interfere with a verdict upon the ground that upon the whole evidence it has difficulty in appreciating the mental process by which the jury arrived at its conclusions, and so is tempted to conclude that the jury acted either stupidly or dishonestly.
>
> In several recent cases I have yielded to this process of reasoning and interfered with the verdict. Fortunately, the cases were taken to the Supreme Court and my error was made apparent. Here, I am at a loss to understand the motives or the principle upon which the jury acted. But I hesitate to say that I am convinced that this establishes either dishonesty or stupidity on the part of the jury.

At common law, if there is some evidence, but the court concludes that reasonable men could not have found as the jury did, it must direct a new trial.[37] The courts, however, are not consistent on this point and in some cases the appellate court will direct a verdict. In any event, the court's powers on appeal have been modified by the Court of Appeal rules. We discuss those rules later in this chapter.

In *Harris* v. *Winnipeg Electric Railway Co.*,[38] the plaintiff was injured while alighting from one of the defendant's rail cars. She alleged negligence on the part of the defendant in failing to keep the steps free of ice and snow. Her evidence was conflicting and unsatisfactory, and flatly contradicted on many important aspects by passengers quite disinterested in the litigation. The jury found in her favour. The Manitoba Court of Appeal held that it was a verdict which reasonable men could not, on the evidence, fairly find, and dismissed the action. The ruling was confirmed by the Supreme Court of Canada. Idington J. dissented. If there was no evidence, and the learned trial judge might have entered a non-suit, so might the Court of Appeal dismiss the action. If, however, there is some evidence, but the jury's finding is against that evidence, the appellate court must order a new trial.

In the absence of legislation altering the powers of the Court of Appeal, Idington J.'s view of the common law would appear to be correct. If a jury's finding is perverse, there must be a new trial.[39] Various jurisdictions have enacted legislation which permits an appellate court broader powers to vary jury verdicts. We discuss legislatively conferred authority later in this chapter.

If there is no evidence, the court may direct a verdict. In *Vertulia* v. *Kratz*,[40] a taxi passenger brought an action against the driver and company and against the driver of another car, for injuries arising out of a collision between the taxi and the other car. The other car had run a red light. The taxi driver was unable to avoid the accident. The jury found the motorist 65% liable and the taxi company 35% liable. The finding against the taxi company was reversed by the Court of Appeal:[41]

> . . . the jury's findings of negligence as against the defendant Rovet are so speculative in their character and essence and so wholly unsupported by the evidence that they cannot prevail.

We discuss this aspect of an appellate court's jurisdiction in the next section.

2. Where There is No Evidence

In the last chapter we observed that a trial judge may withdraw the case from the jury if there is no or insufficient evidence upon which it could make a finding. If the trial judge takes the case from the jury on that ground, and the

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[37] *See, e.g., Vertulia* v. *Kratz, Rovet and Marcus*, (1956) 6 D.L.R. (2d) 8 (Ont. C.A.).

[38] [1920] 2 W.W.R. 231 (S.C.C.).

[39] *Vertulia* v. *Kratz, Rovet and Marcus, supra*, n. 37.

[40] *Ibid.*

[41] *Ibid.* at 19, *per* Schroeder J.A.

Court of Appeal disagrees with that conclusion, it may order a new trial or deliver the judgment which, in its opinion, should have been pronounced by him:[42]

> He does not found his judgment on the weight or credibility of the evidence but upon a denial that there was any evidence . . .
>
> This Court is therefore free to review the record without the restraint of any expessed or implied findings by the trial judge as to credibility, and, if in disagreement with the learned trial judge, to deliver the judgment which in its opinion should have been pronounced by him.

Similarly, if the trial judge enters judgment based upon a jury verdict and the Court of Appeal concludes that there was no or insufficient evidence to leave to a jury, they may direct a verdict.[43]

In *Banbury* v. *Bank of Montreal*,[44] the issue arose whether the Court of Appeal had jurisdiction to direct a verdict on the basis of no or insufficient evidence in the absence of a motion by counsel to that effect before the case was left to the jury. It was held that the Court of Appeal had that jurisdiction, based, in part, on O. 58, r. 4:[45]

> Instead of granting a new trial, they [the Court of Appeal] can, in a proper case, direct judgment to be entered for the defendant. They ought, in my opinion, to exercise this power whenever such a course will, in their opinion, do complete justice between the parties — for example, when they have all the available evidence before them, and there is no chance of a new trial bringing to light other material facts. It appears to me that this is precisely that case.

3. Jurisdiction Conferred by Legislation

Order 58 r. 4 of the English rules provided as follows:

> The court of appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.

This rule must be compared with Order 40 r. 10 of the English rules, which governed the jurisdiction of the trial judge to enter judgment. That rule provided, in part, as follows:

> The Court may draw all inferences of fact, *not inconsistent with the finding of the jury*, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, give judgment accordingly. (emphasis added)

The effect of these two provisions was discussed in *Skeate* v. *Slaters, Ltd.*,[46] as follows:

> It is, however, important to consider whether the powers of this Court on appeal from a trial by a jury are limited to those formerly exercised by the King's Bench Division under Order XL., r. 10. *Millar* v. *Toulmin* decided that under Order LVIII., r. 4, greater powers are given to the Court of Appeal than were conferred under Order XL., r. 10, and, in the words of Lord Esher, include "the power, if all the necessary materials are before the Court, of giving that judgment which, in the opinion of the Court, ought to be the judgment between the parties, even though such judgment be inconsistent with the findings of the jury." . . . In *Allcock* v. *Hall* the Court of Appeal again considered the question with the assistance of the

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[42] *Hunsinger* v. *The Town of Simcoe*, [1946] O.R. 203, [1946] 2 D.L.R. 632, *aff'd*. [1948] 3 D.L.R. 224 (S.C.C.) *per* Roach J.A. at 207; *see also Tait* v. *Township of McKellar*, [1951] O.R. 226 (C.A.); *Fulton et al. v. Creelman*, [1931] S.C.R. 221, [1931] 1 D.L.R. 733; *Wilson* v. *Kinnear*, [1925] 2 D.L.R. 641; *Young* v. *Younger*, [1945] 3 D.L.R. 195 (Ont. C.A.); *Berthiaume* v. *Ottawa*, [1946] 4 D.L.R. 770 (Ont. C.A.); *Re Beardmore*, [1935] 4 D.L.R. 562 (Ont. C.A.).

[43] *Fraser* v. *British Columbia Electric Railway*, [1919] 2 W.W.R. 513 (B.C.C.A.); *McPhee* v. *Esquimalt and Nanaimo Railway Co.*, (1913) 49 S.C.R. 43, 5 W.W.R. 926: where upon the facts it can be reasonably said that one view only is permissible, judgment may rightly be entered in accordance with that view. In *Maltby* v. *British Columbia Electric Railway Co.*, [1920] 2 W.W.R. 543 (B.C.C.A.), McPhillips J.A. held that the trial judge was entitled to adopt that course; *quaere*, is this the directed verdict exception? or is it an appellate function?

[44] (1918) 44 D.L.R. 234.

[45] *Banbury* at 298, *per* Lord Parker; *see also Connecticut Mutual Life Insurance Co. of Hertford* v. *Moore*, (1881) 6 App. Cas. 644 (P.C.).

[46] [1914] 2 K.B. 429 (H.L.), *per* Lord Reading C.J. at 436-7.

observations of Lord Halsbury, and came to the conclusion that they had such powers and exercised them by entering judgment for the defendant . . .

. . . The authority of *Allcock* v. *Hall*, approved by Lord Loreburn, is clearly binding upon us, and I am of opinion that this Court, if satisfied that it has all the necessary materials before it, and that no evidence could be given at a retrial which would in this Court support a verdict for the plaintiff, ought to enter judgment for the defendants. As Lord Loreburn has said, this power should be cautiously exercised.

Accordingly, under Order 58 rule 4, the Court of Appeal was able to direct a verdict contrary to the jury's findings, if all the evidence was before the Court and the trial judge could have directed a verdict.[47] That was the conclusion of Phillimore L.J.:[48]

> The result, I think, is that the cases lay down that when the Court, to which the motion for new trial is made, sees that the verdict was wrong; and sees also that upon the admitted facts, or the only possible evidence that could be given, the verdict should be the other way, and has all the materials before it, it may conclude the case, dispense with another trial by a jury, which will either result in a verdict for the applicant or be itself set aside and so toties quoties, and at once give judgment. And I may go a step further and say that this Court under Order LVIII., r. 4, has the further power which the Divisional Court had not upon motions for new trial to complete the materials before it by drawing any inferences of fact; whereas a Divisional Court was limited to drawing inferences of fact not inconsistent with the finding of the jury. In *Allcock* v. *Hall* Lopes L.J. states his reason as follows: "I am satisfied that if the case were sent to a new trial, no fresh evidence could be usefully given on behalf of the plaintiffs. All the materials are before the Court to enable it to deal with the case if it has power to do so." Lord Loreburn L.C. in *Paquin* v. *Beauclerk* correctly summarizes the decision in *Allcock* v. *Hall*. "In the latter case all the judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury, yet, if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment." I think his words "no jury could properly find" mean what they say, and do not mean "the jury could not have properly found." I incline to think that by the word "properly" he means what Lord Atkinson means by the word "legitimately," and that both are referring to cases where a jury ought to be directed by the judge to find the verdict one way, there being no evidence to support a verdict the other way, and not to cases which must be left to the jury, though if the verdict be one way a second inquiry may be directed.

Under the 1961 British Columbia Supreme Court Rules, Order 40, r. 10 was identical to the English Order 40 r. 10. That rule provided as follows:

> 10. Upon a motion for judgment, or upon an application for a new trial, the Court may draw all inferences of fact, not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit.

No rule under the previous Court of Appeal Rules, nor any section under the *Court of Appeal Act, 1959*, was similar to Order 58, r. 4 of the English rules. In its place were section 7 of the *Court of Appeal Act*, which governed amendment of pleadings and the reception of further evidence, and Rules 33, 34 and 35, which governed the ordering of new trials. Portions of the former *Court of Appeal Act* are reproduced in Appendix B to this Report. Portions of the former Court of Appeal Rules are to be found in Appendix C.

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[47] *See also, Calmenson* v. *Merchants' Warehousing Co. Ltd.*, (1921) 125 L.T. 129 (H.L.); *Rural Municipality of Victory No. 226* v. *Saskatchewan Guarantee and Fidelity Co.*, [1928] S.C.R. 264; *Brody* v. *The Dominion Life Assurance Co.*, [1928] S.C.R. 582.

[48] *Supra*, n. 46 at 446-7.

Rule 7(3) of the former Court of Appeal Rules appears to be closest to Order 58 r. 4. The Court of Appeal's power, however, to draw inferences of fact, give judgment or order what ought to have been done at trial or make any other order, depended upon the introduction of new evidence. It would appear that the Court of Appeal had no jurisdiction under the former Rules to make inferences of fact or direct a verdict on the basis of evidence led at trial.

Notwithstanding these apparent defects in the Court's jurisdiction, no significant discrepancy arose between the English practice and the British Columbia practice under the *Court of Appeal Act, 1959* and the rules adopted under that Act. Under the current *Court of Appeal Act*,[49] section 9 governs the Court of Appeal's powers and section 27 refers to new trials and hearings. Under the new Rules, Rule 24 permits the introduction of new evidence. The new *Court of Appeal Act* is reproduced in part in Appendix D to this Report. The new Court of Appeal Rules, in part, are to be found in Appendix E.

The Court of Appeal's jurisdiction to hear new evidence is unchanged. The ambit of section 27(2), which permits the court to give judgment on some of the issues and direct a new trial on the remaining issues, is uncertain. The power of the Court of Appeal to direct judgment as it sees fit on some of the issues arising on appeal may be a broad power, or one limited to circumstances of no or insufficient evidence. Or the power may be limited to affirming those portions of a judgment which are unobjectionable. The Court of Appeal's jurisdiction to make inferences of fact is no longer limited to cases where new evidence is introduced. Section 9(1)(c) permits the Court of Appeal to "make or give any additional order that it considers just." The use of the term "additional" suggests that it is limited to ancillary questions and does not extend to the principle issues in dispute. On the other hand it may embrace a wide power to direct judgment. It is uncertain how this power might have altered common law principles discussed earlier.

The *Court of Appeal Act* also provides that:

> **Regulation of procedure and practice not provided for**
>
> **30.** Where no special provision is contained in this Act or the rules, the procedure and practice of the court shall be regulated by analogy to this Act and the rules or, where there is no appropriate analogy, by analogy to the *Supreme Court Act* and the Supreme Court Rules.

Either that section, or section 9(1)(a), which permits the Court of Appeal to make or give any order that could have been made or given by the court or tribunal appealed from, gives the Court of Appeal the powers that may be exercised by a trial judge under Supreme Court Rule 41. That rule is reproduced in Appendix A.

4. Apportioning Liability

While it is sometimes difficult to determine which party is at fault, it is often immeasurably more difficult, if both were at fault, to determine how the blame should be divided:[50]

> Accepting then the finding of the jury that both parties were guilty of negligence which contributed to the injury, the apportionment of blame by fixing degrees of fault presents a very difficult problem on which honest and considered opinions may well differ. It is a matter most suitable to be decided through the

[49] S.B.C. 1982, c. 7.

[50] *Bisson* v. *Powell River*, (1967) 62 W.W.R. 707, 66 D.L.R. (2d) 226, *aff'd.* without written reasons, (1968) 64 W.W.R. 768, 68 D.L.R. (2d) 765, (S.C.C.), *per* MacFarlane J.A. at 734; referred to with approval in *Swyrd* v. *Tulloch*, [1954] S.C.R. 199, and in *LeBlanc* v. *Corporation of the City of Penticton*, *supra*, n. 19.

collective wisdom of a jury. The principle to be applied by an appellate court where the allocation has been made by a trial judge was stated by Viscount Simon, L.C. in The *"British Fame"* v. *The "Macgregor"*, [1943] A.C. 197, 112 L.J.P. 6, [1943] 1 All E.R. 33, as follows as [sic.] pp. 198-9:

> "It seems to me, my Lords, that the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial judge."
>
> This must apply with equal if not greater force to apportionment of blame by a properly directed jury. Speaking for myself alone I feel bound to say that I would myself have attributed a greater degree of blame to the respondent but I am unable to assign any reasons which I can regard as sufficient to justify interference with the jury's view.

Consequently, courts are reluctant to vary a jury's findings with respect to apportionment of liability. The courts will, however, vary apportionment of liability when it is based, for example, on a misunderstanding of a vital fact bearing on the matter.[51]

5. Varying Quantum

The issues of damages and apportionment of liability are, arguably, linked. Both are the province of the jury. In *Ritchie* v. *Gale*,[52] a jury damage assessment was reduced. Macdonald C.J.B.C. dissented, in part because he felt that it was an intrusion into the jury's field. A new trial may not be ordered on the sole ground of assessment of damages.[53] The appellant must show misdirection or other fact which indicates the amount of damages is indefensible:[54]

> In the case before us, however, the damages had been assessed by a jury and the Court of Appeal had no jurisdiction in respect of the amount awarded to rehear the case and control the verdict of the jury. The court is not a court of review for that purpose. If, viewing the evidence as a whole, the Court of Appeal can see plainly that the amount of damages is in law indefensible, or that the trial has been unsatisfactory by reason of misdirection or wrongful admission or rejection of evidence, or if it is demonstrable that the jury have or must have misunderstood the evidence or taken into account matters which could not legally affect their verdict, the court may grant a new trial for the reassessment of the damages.

The court's jurisdiction to review an award of damages which is excessive corresponds to its jurisdiction to set aside a verdict on the ground that it is against the weight of evidence.[55] Under the common law, an appeal court could not vary a jury award without the consent of both parties. It could only order a new trial.[56] The test that applied in those cases was the same as that applied to review of the jury's verdict on liability. The court would not grant a new trial unless, in the circumstances, the damages were so large or so small no jury could reasonably have given them.[57] The court would also order a new

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[51] *British Fame (Owners)* v. *Macgregor (Owners); The Macgregor*, [1943] A.C. 197, [1943] 1 All E.R. 33 (H.L.); *see also*, *LeBlanc*, *ibid.* *Protopappas* v. *British Columbia Electric Railway and Knap*, (1946) 62 B.C.R. 218, [1946] 1 W.W.R. 232, [1946] 2 D.L.R. 330, varied [1946] 4 D.L.R. 1, 60 C.R.T.C. 28 (S.C.C.); *Thuroklint (Owners)* v. *Koningin Juliana (Owners); Koningin Juliana*, [1975] 2 Lloyd's Rep. 111 (H.L.).

[52] [1934] 3 W.W.R. 703, 49 B.C.R. 251 (B.C.C.A.).

[53] *Warren* v. *Gray Goose Stage Ltd.*, [1938] S.C.R. 52.

[54] *Ibid.* at 57; *see also McHugh* v. *Union Bank*, (1913) 3 W.W.R. 1052, [1913] A.C. 299, at 309, 82 L.J.P.C. 65; *Mechanical and Gen. Inventions Co.* v. *Austin*, *supra*, n. 21 at 373, 104 L.J.K.B. 403; *Pollard* v. *Chipperfield* (1952) 7 W.W.R. 596, at 602; *Montreal Tramways Co.* v. *Deeks*, [1953] 2 S.C.R. 404; *Peterson* v. *McIntosh*, [1934] 1 D.L.R. 289 (S.C.C.), *aff'g*. [1933] 1 W.W.R. 440.

[55] *Warren* v. *Gray Goose Stage Ltd.*, *ibid.* *per* Kerwin J.; *see also Praed* v. *Graham*, [1890] 24 Q.B.D. 53, (1889) 59 L.J.Q.B. 230.

[56] *Watt* v. *Watt*, [1905] A.C. 115, 74 L.J.K.B. 438 (H.L.); *see also*, *The Connecticut Mutual Life Insurance Company of Hertford* v. *Moore*, *supra*, n. 45; *Pat* v. *Illinois Publishing and Printing Co.*, *supra*, n. 16.

[57] *Praed* v. *Graham*, [1890] 24 Q.B.D. 53, (1889) 59 L.J.Q.B. 230.

trial if the judge misdirected the jury as to damages or if there was a mistrial.[58] An appellate court was less likely to disturb an award of damages on the ground that it was inordinately low:[59]

> Cases where a new trial has been granted on the ground that the amount of a verdict was too small, are very rare; the rule is, that where there has been no misconduct on the part of the jury, no error in the calculation of the figures, and no mistake in law on the part of the Judge, a new trial will not be granted; a new trial will, however, be granted if it can be shown that the jury wholly omitted to consider some substantial element of damage which they ought to have taken into their consideration . . .

That position is justified by the argument that to do otherwise is *prima facie* to usurp the functions of the jury and invade the rights of the defendant.

In British Columbia, under the previous Court of Appeal Rules, the Court of Appeal could reduce a jury award.[60] That provision has been omitted from the new Act and Rules and it is uncertain how that omission has affected the Court of Appeal's jurisdiction.

In *Lew* v. *Wing Lee*,[61] an action for malicious prosecution, the trial judge reduced the jury's award of $10,000 to $5,000, because the plaintiff had only claimed $5,000 general damages. The Court of Appeal agreed that the damages awarded by the jury were excessive. The Supreme Court of Canada held that the trial judge had no jurisdiction to reduce damages.[62] It also held that the defendant had a statutory right to have the general damages assessed by a jury. The Court of Appeal could not consider the verdict and enter a reduced judgment. A new trial was required. The Privy Council, on the appeal of *Lew*,[63] agreed, saying that the Court of Appeal's statutory power to reduce damages had no application to cases where the party had, under statute, the right to have the dispute determined by the jury. The Privy Council also said that the Supreme Court of Canada, in its judgment in *Lew*, had held that a litigant's right to trial by jury prevented an appellate court from reducing damages pursuant to jurisdiction conferred on them by the legislature. In *Collins* v. *S.C. Motor Transportation Ltd.*, it is explained[64] that the basis of the decision of the Supreme Court of Canada in *Lew* v. *Wing Lee* was that in effect no award had been made by the jury. The Privy Council was incorrect when it characterized the judgment of the Supreme Court of Canada as holding that a litigant's right to trial by jury meant that an appellate court could not be empowered by statute to reduce an award of damages made by a jury.

The validity of the Court of Appeal rule that permitted the reduction of a jury award was questioned in *Collins*, on the ground that the Rules must be limited to matters pertaining to practice and procedure. Substantive rights could not be altered by the rules. That argument was rejected. The rules have been approved by the Legislature and thereby given the force of law. It was not fatal that some rules affected substantive rights.[65] It has been confirmed,

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[58] *Put* v. *Illinois Publishing and Printing Co.*, *supra*, n. 16; *Johnston* v. *Great Western Railyway Co.*, [1904] 2 K.B. 250 (C.A.): *e.g.*, a new trial will be ordered if the jury applied the wrong measure of damages or took into consideration matters they should not have considered; *see also Halliday* v. *Sanrud*, (1980) 15 B.C.L.R. 4; if the mistrial is based on objections to the trial judge's directions to the jury, the Court of Appeal will not act, unless those objections were made at trial: *Lewasseur* v. *Kozlowski*, [1980] B.C.D. Civ. 3654-03; *Earle* v. *Smith*, (1972) 22 D.L.R. (3d) 334 (N.S.S.C.A.D.).

[59] *Put* v. *Illinois Publishing and Printing Co.*, *supra*, n. 16 at 16-17 (Sask. C.A.), *per* Martin J.A.; *see also*, *Phillips* v. *London & South Wetern Railway Co.*, [1880] 5 Q.B.D. 78, 49 L.J.K.B. 233; *Johnston* v. *Great Western Railyway Co.*, *ibid*. *McHugh* v. *Union Bank of Canada*, *supra*, n. 55; *Middleton* v. *McMillan*, [1929] 1 D.L.R. 977 (B.C.C.A.).

[60] *See Collins* v. *British Columbia Motor Transporation Ltd.*, (1952) 5 W.W.R. 508 (B.C.C.A.); *Carty* v. *British Columbia Electric Railway Co.*, (1911) 16 B.C.R. 3, 16 W.L.R. 224 (C.A.); *Taylor* v. *British Columbia Electric Railway Co.*, (1912) 2 W.W.R. 923 (S.C.C.); *Ritchie* v. *Gale*, [1934] 3 W.W.R. 703, 49 B.C.R. 251.

[61] [1924] S.C.R. 612 (S.C.C.).

[62] Relying on *Watt*, *supra*, n. 57; and on *Bray* v. *Ford*, [1896] A.C. 44, 65 L.J.Q.B 213.

[63] [1925] 3 W.W.R. 49, [1925] A.C. 819.

[64] *Supra*, n. 60 at 514.

[65] *See also*, *Taylor* v. *British Columbia Electric Railway Co.*, (1912) 2 W.W.R.923.

therefore, that although an appellate court has no inherent jurisdiction to increase or decrease damages awarded by a jury, that jurisdiction may be conferred by legislation.

It follows that, in the absence of legislative authority, the Court of Appeal has no authority to increase a jury award which is unreasonably low. In *Force* v. *Gibbons*,[66] Bouck J. observed:[67]

> Apparently the Court of Appeal cannot increase an award of damages given by a jury but a new trial must be ordered if that court finds the damages inordinately low . . .

In *Stroud* v. *DesBrisay*,[68] it was said that it was not for the Court of Appeal to increase a jury award when there was no legal wrong apparent that would justify that course. Inordinately low damages were not enough reason in themselves:[69]

> I only need refer to one case, which has not been mentioned during the argument, and that is our own recent decision in *Middleton* v. *McMillan* which is reported in (1929), 1 D.L.R. 977, where we held, in dismissing an appeal to increase damages, that it was clear that the *quantum* of damages should not be disturbed on appeal unless it is clear that the trial judge overlooked some element of damage. That decision of our Court was followed recently by the decision of the Appellate Court of Saskatchewan in *Pat* v. *Illinois Publishing & Printing Co.* (1929), 2 W.W.R. 14. And perhaps I should also refer to two other recent cases of this Court, that is to say our decision in *Hodgkinson* v. *Martyn* (1928), 40 B.C. 434, and *Day* v. *Canadian Pacific Ry. Co.* (1922), 30 B.C. 532, where the governing principles are collected. The *Middleton* case and the *Pat* case are important in this respect, *viz.*, they shew that the principle for increasing damages is the same as that for decreasing them. It is true that in certain cases, *e.g.*, in the *Martyn* case, the situation may be such that the assessment of the damages is so large, or so small, as of itself, *ex facie*, to entitle the Court to draw the inference that some element has entered into the jury's (or judge's) consideration which should not have been present: there is also a marked illustration of this in a very recent case in the English Court of Appeal, *Tolley* v. *J.S. Fry and Sons, Limited*, wherein Lord Justice Scrutton adopts the same view, as reported in the current number of 46 T.L.R. [(1929)] 108.

The rule which permitted the Court of Appeal to reduce an excessive award of damages, provided as follows:

> **Excessive Damages**
>
> **36.** Where excessive damages have been awarded by a jury, if the Court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial.

The omission of that rule from the new *Court of Appeal Act* and Rules raises some doubt, therefore, whether the Court of Appeal may continue to reduce an excessive award of damages, or must order a new trial. It would appear, however, that the Court of Appeal's jurisdiction to vary a jury award is, in practice, unchanged under the current Act and Rules.

Even when empowered to vary quantum, an appellate court is not justified in substituting a figure of its own for that awarded by a judge or by a jury merely because it would have awarded a different figure at first instance. The court must find a wholly erroneous estimate of damages entirely out of proportion to other awards given by courts in similar factual circumstances before it may vary the award.[70] That is the test required by the leading case on

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[66] (1978) 9 B.C.L.R. 144 (B.C.S.C.).

[67] *Ibid.* at 152.

[68] (1930) 42 B.C.R. 507 (B.C.C.A.).

[69] *Ibid. per* Martin J.A. at 510.

[70] *Andrews* v. *Grand & Toy Alberta Ltd.*, (1978) 2 S.C.R. 229; *Letourneau* v. *McCoy*, (1980) 21 B.C.L.R. 21 (B.C.C.A.); *Fields* v. *Lloyd*, [1982] B.C.D. Civ. 3658-03 (B.C.C.A.); *Lepare* v. *Iceton*, [1982] B.C.D. Civ. 3658-04 (B.C.C.A.).

this point, *Nance* v. *B.C. Electric Ry. Co.*,[71] In *Nance*, the jury awarded $35,000. The Privy Council reduced that verdict to $22,500 on the basis that $35,000 was an inordinately high measure of damages on the evidence. It is our understanding that, as a rule of thumb, the courts determine whether a jury verdict is inordinately high or inordinately low by whether it differs from the damages the appellate court would have awarded by one third. For example, if the jury makes an award of $60,000, then if the Court of Appeal concludes that damages should have been $40,000 or less, or that they should have been $80,000 or more, it will vary the jury's verdict. This is a useful approach to determining whether damages are inordinately high or low, but obviously there is no rigorous or precise test available to resolve this issue. An appellate court may also vary quantum if the award made by the jury was made on wrong principles, resulting, for example, from misdirection by the trial judge.[72]

D. Summary

The powers of the Court of Appeal to review a judge's verdict are broader than those it may exercise when reviewing a jury's verdict. In general, a Court of Appeal may direct a verdict if the judge might have done so at trial. If there is some evidence to go to a jury, then the court may reject a jury verdict only if it was one that reasonable men could not have come to. At common law, the Court of Appeal could only order a new trial in those circumstances. Under legislation, they may now, in some cases, enter a verdict. The new *Court of Appeal Act*, however, departs significantly from the previous legislation and rules which governed the Court of Appeal. It is too soon to say how the court's jurisdiction may have been affected.

Notwithstanding an appellate court's powers of review, as a policy matter, the Court of Appeal is extremely reluctant to vary a jury award.

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[71] (1951) A.C. 601.

[72] *Epstein* v. *Wyle*, (1980) 25 B.C.L.R. 341 (B.C.C.A.).

CHAPTER IV REFORM

A. Introduction

In the preceding chapters, we have observed that juries may arrive at unreasonable verdicts, and that the powers of a trial judge or of an appellate court to correct or reject those verdicts are limited. In this chapter we examine the case for reform of the jurisdiction of a trial judge or of an appellate court to review a jury verdict.

B. The Working Paper

A Working Paper on "Review of Civil Jury Awards" was circulated by the Commission in August 1983. Copies of the Working Paper were sent to lawyers, judges and law professors. Copies of the Working Paper were also sent to all law libraries in British Columbia and major law libraries across Canada. A notice of the Working Paper's publication was sent to every lawyer in British Columbia.

In the Working Paper, the Commission tentatively proposed that a trial judge sitting with a jury should have jurisdiction to vary an award of damages that was wholly inappropriate. The trial judge's jurisdiction, it was proposed, should correspond to that exercised by the Court of Appeal when reviewing a jury award.

C. Responses to the Working Paper

We received a large number of responses to the Working Paper. Specific points raised by our correspondents will be addressed later in this chapter. At this point, however, it is appropriate to make several general observations concerning the responses.

To begin with, the submissions we received divided into three different philosophical camps.

Some of our correspondents strongly supported the jury system and felt no changes should be made touching on that system. The jury is an ancient institution which has worked well for centuries. The functions it serves and the way it works cannot be analyzed with scientific precision. Changes affecting the jury may well impair its use and jeopardize a fundamental and essential civil right.

Some of our correspondents were opposed to the continued use of the jury. It is a clumsy and archaic device for achieving justice. Its results are unpredictable. It is expensive and it tends to lengthen litigation. There is no valid reason for its continuation, particularly when one considers that most other commonwealth jurisdictions have restricted its use with no perceptible impairment to justice or civil rights.

Some of our correspondents were neutral on the jury system. Submissions falling into this camp suggested that the jury usually works well enough, but that some improvements for the review of jury awards were called for. Some suggested that very few actions to be heard by jury actually proceed to trial. In one submission, it was observed that the importance of the jury has diminished in recent years. This is due, in part, to methods adopted in the assessment of damage awards. Compensation for pecuniary loss is established by receipts for expenses incurred, or based upon actuarial evidence. Whether a judge or a jury is called upon to do the arithmetic, there is very little difference in result. The importance of the jury today lies chiefly in making

findings of fact, particularly in determining liability, and in assessing damages for non-pecuniary loss.

We would like to state at the outset that we are not addressing the issue of the value of the civil jury. The fact is that in British Columbia a significant number of trials are heard by juries, and a significant number of appeals are taken from jury verdicts. It is well known that in British Columbia, as in many other jurisdictions, the courts are faced with substantial caseloads and the resulting delay in the administration of justice is approaching crisis proportions.

There is no doubt that the jury contributes to that delay. Other jurisdictions have responded to this problem by curtailing jury use. We think that approach would be perceived by many in British Columbia as undesirable. Our concern is whether amendments to the law can make jury use more effective by reducing its expense and any tendency it may have to delay finality in litigation.

D. Should There be any Power to Review a Jury Verdict?

This project was added to the Commission's program in response to a reference from the former Attorney General. Representations had been made to the Attorney General that the Court of Appeal should have no jurisdiction to vary a jury award without the consent of the parties. If the award was wholly out of proportion, the matter should be retried before a second jury.

The suggested approach follows the common law and still prevails in some other jurisdictions, most notably England. (In England, however, the right to trial by jury is restricted. Personal injury actions, for example, are usually not heard by juries.)

Several reasons prompted amendment of the common law in British Columbia to permit the Court of Appeal to vary jury awards. First, trial by jury is expensive and often inefficient. If there are compelling reasons for refusing to accept a jury verdict, having the matter retried before another jury is probably the most expensive and time-consuming method of arriving at a satisfactory verdict.

Second, there is no guarantee that another jury will arrive at a reasonable verdict. In *Benson* v. *Kwong Chong*, a New Zealand case mentioned in Chapter I, three successive jury trials were held, and each time the jury arrived at a verdict in favour of the plaintiff, which the Court of Appeal concluded was wrong. The facts of that case indicate that the juries were motivated by racial prejudice.Finally, the matter was considered by the Privy Council, which concluded that a verdict in favour of the plaintiff must be entered.

While this kind of case, one hopes, arises very rarely, it suggests a need for checks and balances on the jury system. It is not unknown for a new trial to take place because the first jury's award of damages was excessive, only to have the second jury, on the retrial, bring in an award higher still. That occurred in *Taylor* v. *B.C. Electric Ry. Co.*[1]

In addition to economy and efficiency, review of jury verdicts tends to ensure that such patent injustice will not occur. For that reason, we favour review of jury verdicts. There is no compelling reason to return to the common law position. Nevertheless, the importance of trial by jury should not be overlooked. That is one reason why appellate courts are reluctant to vary jury verdicts.

[1] (1912) 16 B.C.R. 420 (B.C.C.A.)

E. When Should a Jury Verdict be Varied?

It follows that any reform should not impinge upon the functions served by trial by jury. When should jury verdicts be reviewable? It is not enough that a judge does not agree with a jury's verdict. That would amount to letting a jury decide issues of fact only so long as they do what a judge would do. If that were the case, trial by jury would represent no alternative to trial by judge alone. It would appear, therefore, that the current law governing review of jury verdicts takes the only approach available to remedy manifest injustice without impairing the use of trial by jury.

Nevertheless, the limited powers of a trial judge to deal with a perverse verdict and those of an appellate court to deal with one that is wholly unreasonable, are, in many cases, inefficient and expensive, since often the only remedy is a new trial. A new trial means that the costs of the first trial have been thrown away and will be incurred again. Moreover, in many cases the parties must incur the costs of one or several appeals before a new trial is ordered. Clearly, preserving the integrity of trial by jury is costly. We think that some attention to the economic aspects of the review of jury verdicts is desirable. In the following sections we will examine options available to reduce some of these costs.

F. Varying Quantum and Apportionment of Liability

Both liability and quantum are questions of fact. To some extent, they are linked. If issues of contributory negligence are involved, an unreasonable apportionment of liability may be offset by the determination of quantum. For example, apart from the question of costs, there is no real difference between finding a defendant 100% responsible for damages of $2000 and finding a defendant 40% responsible for damages of $5000. In either case, the plaintiff will receive $2000. Although questions of liability and quantum should be considered separately, and a conclusion with respect to one should not influence the determination of the other, the cases indicate that juries do, from time to time, confuse the two questions. Considering the matter from the viewpoint of abstract justice, one might deplore that result. Pragmatically, however, the plaintiff with a meritorious claim usually receives an amount that compensates him for his injuries, so that, on the whole, justice is done.

With respect to a trial judge's jurisdiction to review a jury verdict on findings of liability, we can see no justification for departing from the current law. The weighing of the evidence is the province of the jury. If the jury comes to a verdict that is perverse, then the matter should be the subject of a new trial.

A distinction should be drawn on the question of damages, however. Many aspects of damages are quantifiable by objective means and if the jury makes a mistake calculating those damages the trial judge can correct it. Other aspects of damages are not strictly quantifiable. For example, the measure of damages for pain and suffering is highly subjective. The courts, however, have established guidelines which, although largely arbitrary, are useful. It is impossible to determine, for example, what an arm is worth, but it is possible to say that a scar should be worth less. Dickson J. made the following observations in *Lindal* v. *Lindal*:[2]

> A number of secondary principles flow from the basic precept of compensation. The first is that anything having a money value which the plaintiff has lost should be made good by the defendant. If the plaintiff is unable to work, then the defendant should compensate him for his lost earnings. If the plaintiff has to pay

[2] (1982) 129 D.L.R. (3d) 263, 268-9 (S.C.C.).

> for expensive medical or nursing attention, then this cost should be borne by the defendant. These costs are "losses" to the plaintiff, in the sense that they are expenses which he would not have had to incur but for the accident. The amount of the award under these heads of damages should not be influenced by the depth of the defendant's pocket or by sympathy for the position of either party. Nor should arguments over the social costs of the award be controlling at this point. The first and controlling principle is that the victim must be compensated for his loss.
>
> Different considerations are paramount in the matter of damages for non-pecuniary loss. The principle *restitutio* in *integrum* can find only limited application in the matter of non-pecuniary losses. A lost limb or a lost mind are not assets that can be valued in monetary terms. Money cannot repair brain damage or obliterate anguish and suffering.

General limits for awards for serious kinds of injuries have been established. Damages for these injuries will vary depending on the circumstances, but they will still fall within a generally defined range. Significant variation in damage awards for similar injuries casts a shadow upon the administration of justice. Since a jury has no guidelines on what might constitute an appropriate award of damages, it is understandable that their awards may vary significantly.

Since parameters exist to determine the measure of damages, we think judges should have some power to correct an award that is wholly out of proportion to damages awarded in other similar cases. We do not think, however, that a trial judge should be at liberty to reject an award merely because it is one he would not have made. That would severely alter the balance struck by the current division of responsibility between judge and jury. Neither should a trial judge vary quantum to correct a manifest error in a finding of liability. A jury error in a finding of liability should be addressed directly, either on appeal or by retrial.

It is interesting that many jurisdictions in the United States, where trial by jury flourishes and is jealously protected, have found it desirable to place some controls on jury verdicts in the hands of the trial judge. Two practices, called additur and remittitur, permit the trial judge to exercise some control over a jury award. If the jury returns a verdict in which the measure of damages is wholly inadequate, either party may apply for a conditional order for a new trial. The condition imposed on the order for a new trial is that if the party relying on the award consents to a specified increase (additur) or decrease (remittitur) of it, there will not be a new trial.

Additur and remititur have proved to be effective and efficient means of safeguarding against unreasonable jury awards. In most cases, the need for appeal is removed.The trial judge considers the trial record and reasonable inferences drawn from it to determine whether the jury's award of damages is wholly inappropriate. Only in that case will he make a conditional order for a new trial. Additur and remittitur are more fully discussed in Appendix F to this Report.

While additur and remittitur represent an interesting approach to correcting a jury award, we have concluded that these practices should not be adopted. If a trial judge is permitted to review a jury verdict on quantum, he is performing what is essentially an appellate function. The trial judge's jurisdiction in this respect should correspond to that exercised by the Court of Appeal. It is important, therefore, to confirm what jurisdiction the Court of Appeal should exercise when reviewing damages awarded by a jury.

Several of our correspondents felt that only the Court of Appeal should be able to review a jury award. Some suggested that the Court of Appeal's jurisdiction should be confined to ordering a new trial if a jury's award was wholly out of proportion unless the litigants agree to variation of the jury's

award. Both of these positions are inconsistent with the policy of ensuring that disputes are resolved expeditously. Reform of the law by adopting an approach which has the tendency to delay or lengthen litigation is undesirable.

G. Jurisdiction of the Court of Appeal to Vary Quantum

In chapter III we observed that there is some doubt whether, under the new *Court of Appeal Act* and under the new rules, the Court of Appeal may, without the consent of the parties, vary a jury verdict on quantum. Under the former Act and rules the Court of Appeal was permitted to reduce an excessive award. Case law suggests that in the absence of statutory authority an appellate court has no jurisdiction to vary a jury verdict on quantum. It may only order a new trial. The absence of any provision in the new Act or rules on this question may mean that the Court of Appeal no longer has even the jurisdiction to reduce an excessive award, although section 9 of the Act may be framed broadly enough that the jurisdiction of the Court of Appeal has not been altered.

We have concluded that the Court of Appeal should have jurisdiction to vary an award of damages that is wholly unreasonable. The Court of Appeal has varied jury verdicts without the consent of the parties, and it does not appear that this jurisdiction of the Court of Appeal has been questioned since the new Act was enacted.

In the Working Paper we invited comment on whether it was desirable to revise the *Court of Appeal Act* to confirm the jurisdiction of the Court of Appeal to vary a jury award before such doubts arose.

Several of our correspondents felt that if there was any doubt, it was desirable to confirm the Court of Appeal's jurisdiction. One submission forcefully argued that it was unnecessary to introduce legislation confirming that the Court of Appeal could vary a jury award:

> . . . we do not think it is either necessary or desirable to revise the *Court of Appeal Act* to confirm its jurisdiction to vary a jury award without the consent of the parties. Since your Working Paper was prepared judgment has been given in *Black* v. *Lemon and Haglund* (C.A. 810874, 25 November, 1983). At the top of p. 4 Mr. Justice Macfarlane decides, for the Court, that s. 9(1)(c) of the *Court of Appeal Act* gives the Court power to make any order that could have been made by the court appealed from. Since that is contrasted with ordering a new trial, I think it is clear that the Court considered that it had power to award either greater damages or less damages than were set by the jury. In that particular case no change was made. However, I would think that the law should be taken to be that the Court of Appeal has decided that it could substitute its award for the award of the jury without the consent of the parties.

H. The Nance Test

Currently, the test for varying a jury's award of damages depends upon whether it is "wholly out of all proportion." This is called the "*Nance* test."

In *Nance* v. *British Columbia Electric Railway Company Ltd.*,[3] the Privy Council stated the principles which governed review of an award made by a judge and by a jury, as follows:[4]

> Their Lordships now turn to the question of quantum of damages. As already stated, the jury awarded the plaintiff $35,000. The three members of the British Columbian Court of Appeal were unanimous, for different reasons, in holding that this figure could not stand. The Chief Justice was for reducing it to $20,000 (subject to a further reduction to $12,000 in respect of contributory negligence which he found proved); Sidney Smith, J.A., who did not find contributory

[3] [1951] A.C. 601 (P.C.).

[4] *Ibid. per* Lord Simon at 613-4.

> negligence proved, would have awarded $12,000; and O'Halloran, J.A., would have left the figure to be determined at a new trial on materials more adequate than those available at the actual trial.
>
> In those circumstances two distinct questions arise:— (1.) What principles should be observed by an appellate court in deciding whether it is justified in disturbing the finding of the court of first instance as to the quantum of damages; more particularly when that finding is that of a jury, as in the present case. (2.) What principles should govern the assessment of the quantum of damages by the tribunal of first instance itself.
>
> (1.) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint* v. *Lovell*, approved by the House of Lords in *Davies* v. *Powell Duffryn Associated Collieries, Ld.*). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of all proportion" (*per* Lord Wright, *Davies* v. *Powell Duffryn Associated Collieries, Ld.*).

The test with respect to varying an award made by a judge is described as whether "the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage." The test for reviewing a jury award is said to be more rigorous. The award must be wholly out of all proportion before it may be varied.

Is it desirable to apply different standards to varying an award depending on whether it is made by a judge or a jury? The argument usually raised to defend the distinction is not totally convincing. That a judge usually gives reasons, while a jury's deliberation are essentially mysterious, may justify reluctance to vary findings of liability. That difference, however, is of no particular significance when determining whether the measure of damages is appropriate.

Which test would be appropriate? While it is difficult to determine the difference between "a wholly erroneous estimate of the damage" and one that is "wholly out of all proportion," it appears that in practice the results are different:[5]

> In case after case this court has held that it cannot interfere with a jury as readily as with a judge . . .

While it is true the courts say they cannot interfere with a jury verdict as readily as with a judge, it is difficult to determine whether in practice that is true. The English Court of Appeal, when it considered this question, concluded that it should be less hesitant to upset an award of damages by a jury.[6] In effect, the Engish Court of Appeal leaned toward the test currently applied to review of a judge's verdict. Whether any practical difference resulted from that decision is difficult to say.

We have concluded that the *Nance* test should be revised so that the test which currently governs review of a judge's award applies to review of a jury award. It was generally agreed that this revision resolved a distinction which was largely semantic. Whether made by a judge or a jury, an award will only

[5] *See Ward* v. *James*, [1966] 1 Q.B. 273 (C.A.) at 300 *per* Lord Denning M.R.
[6] *Ibid.*

be varied if it is significantly out of line with awards given in similar cases. Providing that a single test governs review of an award made by a judge or by a jury confirms what appears to be the current practice in any event.

The Commission recommends that:

1. The Court of Appeal may review the quantum of damages given by a judge or jury, and if it is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages, give judgment for an amount that is reasonable on the evidence.

[This recommendation provides that the same test is applied to an award made by a judge or jury to determine whether it should be varied, and is patterned after one limb of the *Nance* test.]

It should be observed that the Commission's conclusion to revise the test applied to review of a jury award resolves the earlier issue of whether it is necessary or desirable to confirm that the Court of Appeal has jurisdiction to review and vary a jury verdict without the consent of all parties. Legislation implementing Recommendation 1 will necessarily also confirm that the Court of Appeal has that jurisdiction.

I. Jurisdiction of the Trial Judge to Review Quantum

Earlier we concluded that the trial judge should be able to review a jury award and that this jurisdiction should correspond to that which is exercised by the Court of Appeal when reviewing quantum. We think this approach is desirable for several reasons.

First, the trial judge, because he has heard all of the evidence first hand, has a signficant advantage over the Court of Appeal in determining what measure of damages is appropriate in the circumstances. If he is permitted to review and vary a jury award, and an appeal is taken from his judgement, the Court of Appeal would then have the advantage of the trial judge's conclusions on the evidence to compare with the jury's verdict. That additional information may significantly ease the Court of Appeal's task in determining an appropriate award of damages.

Second, since the powers exercised by the trial judge would correspond to those enjoyed by the Court of Appeal, in many cases there would be no need for an appeal and the cost to the parties would be reduced. On appeal, even the preparation of appeal books can be prohibitively expensive. It would not be unusual for a simple appeal, confined to one or two issues arising from a three day trial, to cost a litigant seven to ten thousand dollars in legal fees and another three or four thousand dollars in disbursements. Other litigants involved in the appeal would be put to similar expense. Review by a trial judge would not require any further expense for disbursements, and legal fees would seldom be calculated on more than a half day of counsel's time, say six or seven hundred dollars.

Third, even if the parties are not content with the result after the trial judge's review, this practice may encourage them to settle the matter without an appeal to the Court of Appeal. Currently, there is often doubt whether the Court of Appeal will vary a jury award since it is difficult to determine whether a jury's award is wholly out of proportion. A party who has, for example, received an award of damages which he considers to border on being inordinately high, may well accept the risk of an appeal by the other party, believing that the odds against varying the jury's award are in his favour. If that issue is first considered by the trial judge, however, the parties may be guided

by the trial judge's conclusion that the award is one which should be varied. It is likely, in that case, that the parties will be inclined to settle the matter.

Fourth, this practice may encourage settlement before an application for review by a trial judge. The amount involved may not justify the costs of an appeal to the Court of Appeal. A successful litigant, in that case, may be reluctant to settle. If, however, he is faced with the prospect of variation of a jury's award through the speedy and economic means of review by the trial judge, he may become more reasonable.

These reasons also suggest that it might be desirable to prevent any appeal to the Court of Appeal on quantum until an application for review has been made to the trial judge. Review might remove the need for an appeal. We suspect, however, that that approach may be procedurally impractical. For example, counsel may conclude that the jury's verdict is wholly inappropriate with respect to both liability and quantum. Review on quantum may be of limited utility in his opinion. It would probably be seen as unjust if the Court of Appeal concluded that it had no jurisdiction to correct a jury's verdict on quantum that was wholly inappropriate in the circumstances on the ground that no application for review had been made to the trial judge.

A costs sanction, however, may be desirable to encourage parties to seek review by the trial judge rather than appeal to the Court of Appeal. For example, on appeal, the Court of Appeal may conclude that the matter could have been resolved by the trial judge. In that case, perhaps the party who brought the appeal, notwithstanding that he was successful, should be deprived of his costs or be held responsible for the other party's costs. We think this is a question which should be considered after there has been some experience with the practice of a trial judge's review of a jury award. It may be that no inducement to use that procedure is necessary. Moreover, since either party is at liberty to appeal from a trial judge's decision on such a review, it is not entirely clear that a party who chooses the appeal route over review by trial judge should be responsible for costs in any event.

We raised this issue in the Working Paper. Our correspondents who favoured granting a trial judge jurisdiction to review a jury award felt that a costs sanction was unnecessary. Costs of an appeal are in the discretion of the Court of Appeal. Usually costs will be awarded to the party who succeeds on the appeal. If review by trial judge would have been appropriate, the Court of Appeal has the jurisdiction to refuse to award costs, or to award costs to the unsuccesful party.

One submission suggested that the tariff of costs should be revised to provide a specific item for the costs of the review. This amendment is not necessary. The application for review will take place before or at the same time as application for judgment. The review will be part of the trial, and costs will be calculated on that basis.

One concern arising from permitting the trial judge to review the jury's award is the possibility of creating another appealable issue leading to more litigation. Would judges intervene too readily? Variation of a jury award by a trial judge should only occur if the trial judge is convinced the Court of Appeal would intervene. If it should happen that trial judges are prepared to vary a jury award on any other basis, we suspect that guidelines will quickly be developed by the Court of Appeal.

An additional concern may be that permitting a trial judge to review a jury award will inevitably lengthen jury trials. Presumably, the party who has lost at trial will invariably apply for review. We do not think that this is a real concern. First, such an application, at least on the issue of whether the jury's

award was inordinately high or low, can be speedily dealt with by the judge. Second, if the jury's verdict is inordinately high or low, so that an appeal taken from it would be meritorious, there should be a trade-off in that an application to the trial judge will often prevent the need to appeal to the Court of Appeal.

One submission we received was firmly opposed to trial judge review of a jury award:

> Most recommendations for reform have the effect of reducing the power of juries to affect the law, and increasing the power of judges to alter verdicts. The three recommendations contained [in the Working Paper on] Review of Civil Jury Awards is no exception . . .
>
> The right of litigants to have the dispute determined by a jury is one which is one of the fundamental rights established in our present legal system. It is a right which the Commission does not suggest should be removed. The danger is that it may be eroded by allowing verdicts to be easily circumvented on appeal. It is submitted that in lowering the appellant's test necessary to set aside a verdict, and giving that power to the trial judge, removes two safeguards, respecting the continued participation of the public at large in the justice system. The first is the right of the parties to receive the jury's verdict on questions of fact despite the inclination of a trial judge to ignore or downplay evidence which the jury found cogent. The second is the right of a party to a review of the verdict by a tribunal which will limit its review to questions of law alone, uninfluenced in its review by its own interpretation of the evidence, and of the witnesses.

We are not persuaded by these arguments. The Commission has not recommended that the test that must be met to set aside a jury's verdict be eased, and later in this submission, it was acknowledged that the variation in the *Nance* test resolves a question that is primarily semantic. It was our conclusion that there was no real difference in substance between the tests that were applied to review of an award made by a judge or by a jury. Whatever the formulation of the test, a trial judge or Court of Appeal should be reluctant to interfere with a jury's award.

Giving a trial judge jurisdiction to review a jury award which parallels the Court of Appeal's current jurisdiction does not represent an erosion of trial by jury. It changes no aspect of the system other than to speed up the process for review by months, and to lower the costs of review by thousands of dollars.

The Commission recommends that:

2. The trial judge be given a jurisdiction, corresponding to that exercised by the Court of Appeal (as provided by Recommendation 1), upon the application of a party, to review a jury's verdict on quantum and to give judgment for an amount that is reasonable on the evidence.

We have also considered what form an application for review of a jury award to the trial judge should take. On appeal to the Court of Appeal, for example, a jury verdict may be attacked on a number of grounds, including procedural errors or irregularities and misdirection of the jury. Perhaps circumstances have changed since the trial, or new evidence has been discovered. In the Working Paper we tentatively concluded that, if this new practise is to work effectively, it must be confined to the sole question of whether the damages awarded by the jury were appropriate.This procedure should not be used to hear new evidence. Although some reconsideration of evidence led at trial will be necessary, the application for review should not permit the parties to embark upon some sort of retrial before the judge. Procedural error or irregularities or misdirection of the jury are not matters that should be raised before the trial judge on review. He is no longer in a position to rule on them. Those issues must be the subject of an appeal to the Court of Appeal.

Some of our correspondents suggested that litigants should be able to introduce new evidence governed by the same rules[7] which permit the admission of new evidence on appeal. No doubt that would increase the circumstances in which an appeal would become unnecessary, but there are two major objections to that position. First, it would tend to lengthen and complicate a procedure which, to be effective, should be simple and expeditious. Second, it would diminish the significance of the jury in the proceedings. One of our correspondents made the following comment:

> The parties have submitted the dispute to the jury and neither should be in a position to retry it on new evidence.

We have concluded that in order to confine the trial judge's review to a consideration of the adequacy of the jury's award, no new evidence should be admissible.

The Commission recommends that:

3. No new evidence may be heard on an application contemplated under Recommendation 2.

J. Appeal From a Trial Judge's Review of a Jury Award

Before a trial judge may substitute his own view for that of the jury's on an appropriate award of damages, he must find that the jury's award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. If it is neither, then the trial judge has no jurisdiction to intervene.

If a trial judge varies a jury award, his decision may be reviewed by the Court of Appeal on two grounds. The trial judge had no jurisdiction to vary the jury's award; or, if he had that jurisdiction, the award set by the trial judge is itself so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. In the first case, the Court of Appeal would restore the jury's verdict. In the second case, the Court of Appeal would determine an appropriate award of damages.

K. Information on Previous Damage Awards

An approach which might resolve problems of inconsistency that arise in jury awards is to let counsel provide juries with information respecting damage awards in similar cases. That practice is not permitted in British Columbia.[8] It is felt that the jury would receive no real guidance from analogies:[9]

> See what would happen! Each counsel would refer the jury to cases which he believed were comparable but which were not really so. Speeches would be taken up with the one counsel citing analogies and the other destroying them. Then the judge would have to review them all again in his summing-up. The inevitable result would be that the minds of the jury would be distracted from the instant case and left in confusion.

Advising juries on the appropriate range of damages need not be confusing. Counsel might make submissions to the trial judge on that issue, in the absence of the jury. The judge could include a discussion of damages appro-

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[7] *See, e.g., Prospect Mortgage Corp.* v. *Bragg*, [1983] B.C.D. Civ. 208-07 (B.C.C.A.); *Hup* v. *Reid*, [1983] B.C.D. Civ. 208-06 (B.C.C.A.); *Douglas* v. *Dougall*, [1983] B.C.D. Civ. 208-01 (B.C.C.A.); *Dobroslavic* v. *Aktary*, (1983) 23 A.C.S.W. (2d) 305 (B.C.C.A); *Tabata* v. *Argau*, (1983) 25 A.C.S.W. (2d) 178 (B.C.C.A); *Morris* v. *Morris*, (1982) 41 B.C.L.R. 239 (B.C.C.A.) leave to appeal to S.C.C. dismissed (1983) 42 B.C.L.R. xxxvii; *Loughlin* v. *Hargrove*, (1983) 23 A.C.W.S. (2d) 182 (B.C.C.A.).

[8] Following the English practice. *See, e.g., Bird* v. *Cocking & Sons Ltd.*, [1951] 2 T.L.R. 1260, [1952] W.N. 5 (C.A.); *Ward* v. *James*, *supra*, n. 5; *Gray* v. *Alanco Developments Ltd.*, (1967) 61 D.L.R. (2d) 652; *Decorby* v. *Wascana Winter Club (No. 7033)*, (1980) 3 Sask. R. 96 (Sask. C.A.); *Howes* v. *Crosby*, (1984) 45 O.R. (2d) 449 (Ont. C.A.).

[9] *Ward* v. *James*, *supra*, n. 5 at 302 *per* Lord Denning, M.R.

priate in the circumstances and the principles the jury might apply when assessing damages in his charge to the jury.

Information on previous *general* damage awards is unlikely to be unhelpful to a jury. Another plaintiff's compensation for costs of future care or lost income can have little relevance to the issues before the jury. In this context, we are concerned only with previous damage awards for non-pecuniary loss. One reason why juries, historically, have not been given information on relevant damage awards is that, until ten years ago, the practice was to make a global award.

While it is possible to provide juries with information concerning previous damage awards for non-pecuniary loss without causing confusion, it is open to question whether that approach would achieve beneficial results. If the trial judge narrowly defines the limits in which damages may be awarded, in effect he substitutes his opinion for the jury's. If the judge indicates a broad range in which damages may be awarded, either the jury will receive little useful guidance or it will be tempted to split the difference to arrive at an "average" award. For these reasons, in the Working Paper we tentatively concluded that juries should not be provided with information on damage awards in similar cases.

Most of our correspondents disagreed. There was a general consensus that juries should be given some guidance on previous damage awards in similar cases. A recurring comment was that it was senseless to keep from a jury the very information upon which its performance would be reviewed. There was disagreement, however, on what method for providing a jury with this information should be adopted.

It was suggested that information on previous cases should be put to the jury. We are apprehensive that information might be needlessly confusing. A submission on behalf of one group suggested that:

> . . . juries are not well qualified to distinguish between the nuances of one case and another and that they would be much plagued by counsel if they were to be given the awards in cases that were alleged to be similar.

A submission on behalf of another group suggested that each counsel should be able to suggest a figure to the jury. It is likely that approach would indicate a general range in which the jury might make their award, but it is open to question how helpful that information will be. Counsel will naturally select the lowest or highest amount ever awarded for similar injuries, de-emphasizing dissimilar aspects of the earlier cases which might have led to the assessment. There is a need for some control over the damage amounts suggested to the jury as appropriate guidelines.

Upon reconsideration, we have concluded that juries should have some information respecting damage awards in similar cases. Counsel should make submissions, in the absence of the jury, to the trial judge concerning an appropriate range for the jury's guidance. The trial judge should then advise the jury of that range, careful as well in his charge to them to advise that the assessment of damages is for the jury alone to decide and that the information on previous damage awards is not binding on them. He should probably also admonish the jury that averaging the range of awards is unlikely to represent an acceptable discharge of their duty.

Howes v. *Crosby*,[10] a recent decison of the Ontario Court of Appeal, in which it was held that the trial judge had no jurisdiction to give the jury guidance on relevant awards without the agreement of counsel, is of interest. In that case, the trial judge had charged the jury on the range of awards that

[10] *Supra*, n. 8

might be made to compensate the plaintiffs for the death of a family member. The trial judge, in his charge to the jury, very carefully and clearly emphasized the manner in which the jury should regard the information on relevant awards:[11]

> Now I am going to try and help you in this case a little bit by giving you some guideposts in relation to amounts. In the past judges have been reluctant to give jurors any indication of figures. You notice the lawyers didn't mention any figures to you and they are not allowed to but we are beginning to respond I think to what some jurors feel they would like to have to help them and what some researchers and academics and even judges are saying ought to be given to the jury. So I am going to mention some figures to you but I want to stress to you that what I say in relation to figures can be completely ignored by you. You can totally ignore everything I say because it is your function to set those figures, not mine. By giving you some of these figures I am only trying to help you, if you feel that you want that help and if you feel it will assist you. I am not going to give you limits. These are not limits. I am not giving you a range within which you must come up with figures. That would be improper. It is not my job to do that. All I am giving you is some indication of what a judge might do in a similar case as a starting point for your discussions and that's all it is meant to be. If I give two figures, an upper and a lower figure, for God's sake don't just divide that figure by two and come out in the middle and go along right in the middle . . . . That would be a dereliction of your duty. That's not what you are here for. You are here to decide and deliberate and determine what is correct. If it happens to be that what you think is correct may come out in one or other of the cases sort of in the middle that's fine if that's what you arrive at. But you have to arrive at that, not by dividing. You have got to assess those facts and consider whether you are near the higher level or beyond it. That is your choice. Or whether on the basis of facts as you find them you think it should be at the lower level, depending on the facts as you find them, and I will try to help you a little bit on that, to assess whether it should be higher or lower down . . .

While the trial judge's charge in this case might not be a model for similar jury charges in the future, there could have been no doubt in the minds of the members of the jury how they were to use the information given by the judge.

One of our correspondents objected to providing juries with information on previous damage awards because most authorities concerning damage awards would be derived from assessments made by judge alone. One function juries serve is to reflect community attitudes, and it is frequently observed that jury damage assessments educate judges on what the community considers appropriate levels for damage awards. Providing juries with information on damage awards that tend to be based on assessments made by judge alone may very well frustrate that function.

We share our correspondent's concern, but it is our conclusion that the trial judge can, in his charge, impress upon the jury that they alone are responsible for assessing damages, in order to ensure that information on other damage awards will be helpful and not restricting.

The Commission recommends that:

4. (1) The trial judge sitting with a jury be permitted, if the judge considers it of assistance to the jury, to advise it of the general range of relevant awards made for non-pecuniary losses similar to those in issue based on submissions of the parties made in the absence of the jury.

(2) If the jurisdiction in (1) is exercised, the jury should be charged that the issue of damages is for them to decide and that they are not bound by the general range of relevant awards.

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[11] *Ibid.*

CHAPTER V RECOMMENDATIONS

A. Summary

The Working Paper on "Review of Civil Jury Awards" which preceded this Report generated a fair amount of controversy. In part, that was to be expected. Questions involving the jury tend to provoke extreme responses from its critics and its supporters. In part, the controversy was surprising. The Commission's proposals were intended to neither enhance nor subtract from the role of the civil jury. They were aimed at improving procedural aspects of jury use and did not touch on the jurisdiction of the jury. The negative reaction to the proposals was due, in large measure, to the fear that any change touching on the jury is an attack on that institution and, to that extent, it was based on a misconception. We were responding to the fact that each year a significant number of jury awards are varied on appeal. Our goal was modest: to develop a speedy appeal process which would not require litigants to meet the substantial costs involved in a formal appeal. The only significant result of the proposals was to permit appeal of a jury award immediately, saving months of delay and avoiding costs measured in thousands of dollars. The tentative proposals made in the Working Paper and the recommendations made in this Report would have no further impact on the system, nor on jury use generally, beyond that.

The majority of submissions we received favoured the proposals and reinforced our conclusion that changes that made review of jury awards more efficient and economical were desirable.

B. List of Recommendations

We have made the following recommendations for reform:

1. The Court of Appeal may review the quantum of damages given by a judge or jury and if it is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages, give judgment for an amount that is reasonable on the evidence. (Page 45)

[This recommendation provides that the same test is applied to an award made by a judge or jury to determine whether it should be varied, and is patterned after one limb of the *Nance* test.]

2. The trial judge be given a jurisdiction, corresponding to that exercised by the Court of Appeal (as provided by Recommendation 1), upon the application of a party, to review a jury's verdict on quantum and to give judgment for an amount that is reasonable on the evidence. (Page 47)

3. No new evidence may be heard on an application contemplated under Recommendation 2. (Page 48)

4. (1) The trial judge sitting with a jury be permitted, if the judge considers it of assistance to the jury, to advise it of the general range of relevant awards made for non-pecuniary losses similar to those in issue based on submissions of the parties made in the absence of the jury.

(2) If the jurisdiction in (1) is exercised, the jury should be charged that the issue of damages is for them to decide and that they are not bound by the general range of relevant awards. (Page 50)

C. Acknowledgments

We wish to express our appreciation to all who took the time to consider the Working Paper and offered us their comments and suggestions. The submissions we received were thorough and thoughtful and of great assistance.

We also wish to acknowledge the contribution of two people who played an important role in this project: Kenneth C. Mackenzie, Esq., former member of the Commission, and the Honourable Mr. Justice John S. Aikins, former Chairman of the Commission. Both participated in the development of the Working Paper.

Finally, we wish to express our gratitude to Thomas G. Anderson, Counsel to the Commission. Mr. Anderson was responsible for the research upon which our recommendations are based and, subject to direction from the Commission, drafted both the Working Paper and this Report.

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September 7, 1984

APPENDICES

Appendix A

SUPREME COURT RULES
Rule 41 (1) to (7) — Orders

No application for Judgment Necessary

(1) No application for judgment is necessary except where an enactment or these rules otherwise provides. (MR 463.)

Judgment Impossible on Jury Findings

(2) Where, after such redirection as the court thinks appropriate, a jury answers some but not all of the questions directed to it, or where the answers are conflicting, so that judgment cannot be pronounced on the findings, the action shall be retried. (New.)

Only Partial Judgment Possible on Jury Findings

(3) Where the answers of the jury entitle either party to judgment in respect of some but not all of the claims, the court may pronounce judgment on the claims as to which the answers are sufficient and the remaining claims shall be retried. (MR 432a.)

Jury Failing to Reach Verdict

(4) Where the jury fails to reach a verdict in accordance with the *Jury Act*, the action shall be retried. (New.)

Retrial

(5) A retrial under subrules (2) to (4) may take place at the same or subsequent sittings as the court may direct. (New.)

Continuing Trial Without Jury

(6) Where, for any reason other than the misconduct of a party or his counsel, a trial with a jury would be retried, the court, with the consent of the party who required a jury trial, may continue the trial without a jury. (New) [en. B.C. Reg. 178/83, s. 7.]

Idem

(7) Where, by reason of the misconduct of a party or his counsel, a trial with a jury would be retried, the court, with the consent of all parties adverse in interest to the party whose conduct, or whose counsel's conduct is complained of, may continue the trial without a jury. (New.) [en. B.C. Reg. 178/83, s. 7.]

Appendix B

COURT OF APPEAL ACT
R.S.B.C. 1979, c. 74

Appellate jurisdiction

5. The Court of Appeal shall be a Superior Court of Record, and, to the full extent of the power of the Legislature of the Province to confer jurisdiction, there is transferred to and vested in the court all jurisdiction and powers, civil and criminal, of the Supreme Court, sitting as a Full Court, that were held and exercised prior to April 25, 1907, and all other appellate jurisdiction and appellate powers, statutory and otherwise, and however arising or conferred, that were on that date held or exercised by the Supreme Court sitting as a Full Court. And without restricting the generality of the foregoing an appeal lies to the Court of Appeal

(a) from every judgment, order or decree made by the Supreme Court, and whether final or interlocutory, and whether for a matter specified in the Rules of Court or not;

(b) from judgments, orders or decrees of any County Court, whether final or interlocutory, for which an appeal will lie under the *County Court Act;*

(c) from the opinion of the Supreme Court on any matter referred to him by the Lieutenant Governor in Council under the Constitutional Question Act;

(d) from every decision of the Supreme Court or of any County Court, in any proceeding in connection with

(i) certiorari;

(ii) quo warranto;

(iii) mandamus;

(iv) prohibition;

(v) case stated under the Offence Act;

(vi) any point of law taken or raised on an appeal to the County Court under the Offence Act;

(vii) habeas corpus,

and in any matter arising under subparagraphs (i) to (vii), inlusive, in which the appellant is in custody, the Court of Appeal, if sitting, shall give the appeal precedence over every other appeal, and, if not sitting, shall promptly sit for the purpose of hearing the appeal; and in cases of habeas corpus in which the Crown is the successful appellant the Court of Appeal may make an order as it may see fit concerning the rearrest of the defendant;

(e) under any Act or ordinance;

(f) from every order, decision or finding of the registrar.

Original jurisdiction

6. The Court of Appeal shall exercise the original jurisdiction as may be necessary or incidental to the hearing and determination of any appeal.

Further powers

7. For the hearing and determination of any matter within its jurisdiction, and the amendment, execution and enforcement of any judgment or order, and for the purpose of every other authority expressly or impliedly given to the Court of Appeal by this Act, the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court.

Appeal includes motion for new trial

16. (1) Every appeal from a final judgment, order or decree shall be deemed to include a motion for a new trial, unless the notice of appeal expressly states otherwise.

(2) A motion for a new trial shall be taken by way of appeal.

Appendix C

THE COURT OF APPEAL RULES, 1959

AMENDMENT AND FURTHER EVIDENCE

7. (1) The Court has the powers and duties in relation to amendment and otherwise of the Judge or Court appealed from, and power to receive, in its discretion, further evidence upon questions of fact by oral examination in Court, or affidavit or deposition sworn or taken by or before an examiner or commissioner.

(2) Further evidence shall not be received without leave of the Court, except

(a) upon an appeal from an interlocutory judgment;

(b) where no hearing has been held by the Judge or Court appealed from on the merits of the case; or

(c) where the evidence is of matters that have occurred or arisen since the date of the decision appealed from.

(3) Where further evidence is received, the Court may

(a) draw inferences of fact;

(b) give any judgment or make any order that ought to have been given or made; and

(c) make any other order as the result of the reception of the evidence.

(4) The Court may exercise the powers and duties conferred and imposed by this Rule

(a) notwithstanding that part only of a decision is appealed; and

(b) in favour of any party to an appeal, whether or not he has appealed from the decision of the Judge or Court appealed from.

POWER TO ORDER NEW TRIAL

33. If, upon the hearing of an appeal, it appears to the Court that a new trial ought to be had, the Court may, by order, set aside the verdict and judgment and direct a new trial.

34. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned; and if it appears to the Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only or as to the other party or parties.

35. A new trial may be ordered on any question (whatever be the grounds for the new trial) without interfering with the finding or decision on any other question.

EXCESSIVE DAMAGES

36. Where excessive damages have been awarded by a jury, if the Court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial.

Appendix D

COURT OF APPEAL ACT

S.B.C. 1982, c. 7

Powers of Court of Appeal

9. (1) On an appeal the court may

(a) make or give any order that could have been made or given by the court or tribunal appealed from,

(b) impose reasonable terms and conditions in an order, and

(c) make or give any additional order that it considers just.

(2) In an order granting leave to appeal to the court made under any other enactment, a justice may impose reasonable terms and conditions, including terms limiting the grounds of appeal.

(3) The court or a justice may draw inferences of fact.

(4) The court may exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal.

(5) The court may exercise its powers

(a) notwithstanding that only part of an order has been appealed from, and

(b) in favour of any person whether or not he is a party to the appeal.

(6) Where, in this Act or the rules, a power is given to a justice, the court may exercise the power.

(7) The court may discharge or vary an order made by a single justice.

(8) The court and a justice have, in relation to matters of contempt of court, the same powers as the Supreme Court.

(9) For all purposes of and incidental to the hearing and determination of any matter and the amendment, execution and enforcement of any order and for the purpose of every other authority expressly or impliedly given to the Court of Appeal, the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court and, where the appeal is not from the Supreme Court, the power, authority and jurisdiction vested in the court or tribunal from which the appeal was brought.

New trial or hearing

27. (1) If on the hearing of an appeal it appears to the court that there should be a new trial or hearing, the court may set aside the verdict, finding or order and direct a new trial or hearing.

(2) The court may, where it considers that the new trial or hearing should be so limited, give final judgment as to part or parts only of the matter in controversy or as to some or one only of the parties and direct a new trial or hearing as to the remaining part or party.

Further evidence

24. By leave of the court or a justice, evidence may be adduced, in the manner directed by the court or justice, that was not before the court appealed from.

Appendix F

ADDITUR AND REMITTITUR

A. Generally

Additur[1] is the power to make a conditional order for a new trial after the jury returns a verdict in which the measure of damages is wholly inadequate. The condition imposed on the order for a new trial is that if the party relying on the award consents to an increase in it specified by the judge, there will not be a new trial.

Remittitur is the power to make a conditional order for a new trial after the jury returns a verdict in which the measure of damages is excessive. The condition imposed in that case is that if the party relying on the award consents to a reduction specified by the judge (remits), there will not be a new trial.

These practices are analogous. In each case, the party who moves for a new trial is bound by a judicial variation in quantum if the party relying on the jury's verdict consents. The party who moves for a new trial may not be satisfied with the varied quantum either. In that case his remedy is to appeal. These practices in most cases, however, obviate the need for a new trial:[2]

> Additur and remittitur are designed to bring a jury verdict more in accord with the judge's notion of what constitutes adequate compensation to the injured party. In each case the objective is reached without the necessity of enduring a new trial . . . [T]he practices of additur and remittitur emanate from the power of a court to grant a new trial on the ground of inadequacy or excessiveness of the amount of damages awarded by the jury verdict.

The argument against these practices is that they violate the parties' right to have a jury determine controverted issues of fact. We do not find that argument wholly convincing. First, in the circumstances in which additur or remittitur will be applied, the parties will have had a trial by jury where the result is wholly unreasonable. If the right to trial by jury is to be entirely sacrosanct, there should be no recourse from that verdict, other than where the jury has misconducted itself morally or legally. That is not the case. Moreover, the Court of Appeal exercises some jurisdiction to vary a jury verdict on quantum. If review of unreasonable jury awards is desirable (as we have concluded), the choice is between retrial or review. Since either course impinges on the right to jury trial, review by a judge or an appellate court should be preferred, since it is more efficient and economical.

The practice of remittitur (and, in *obiter dicta*, additur) was rejected in *Watt* v. *Watt*,[3] a decision of the House of Lords in 1905. That decision was based upon the conclusion that remittitur and additur had never been the practice in England. The House of Lords did not consider whether these practices might be desirable. In the United States, remittitur was a common law development of the nineteenth century,[4] and has been almost universally accepted. Up until 1967, additur had been adopted in only a few jurisdictions.[5] In 1967, the California Law Revision Commission recommended that the practice of additur should be adopted.[6] In that same year the California Supreme Court, in *Jehl* v. *Southern Pacific Co.*,[7] overruled *Dorsey* v. *Barba*[8] and held that additur does not impair the plaintiff's constitutional right to trial by jury. Moreover, they concluded that it is a procedure well suited to the efficient administration of justice. It was said:[9]

> There is no essential difference between the procedures appropriate for remittitur and additur, and we may therefore look to remittitur cases to determine the proper procedure for additur.
>
> Upon a motion for new trial grounded on insufficiency of the evidence because the damages are inadequate, the court should first determine whether the damages are clearly inadequate and, if so, whether the case would be a proper one for granting a motion for new trial limited to damages . . . If both conditions exist, the court in its discretion may issue an order granting the motion for new trial unless the defendant consents to an additur as determined by the court. The

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[1] This practice is also called "increscitur": *see* Albert C. Bender, "Additur - The Power of the Trial Court to Deny a New Trial on the Condition that Damages be Increased," (1967) 8 California Law Revision Committee *Reports, Recommendations and Studies*, 615.

[2] *Ibid.* 617.

[3] (1905) A.C. 115 (H.L.).

[4] *Supra*, n. 3 at 622.

[5] *Ibid.*

[6] *Ibid.* at 607-14.

[7] (1967) 66 Cal. 2d 821, 427 P. 2d 988, 59 Cal. Rptr. 276.

[8] (1952) 38 Cal. 2d 350, 240 P. 2d 604 (Calif. S.C.).

[9] (1967) 66 Cal. 2d 821, 832-833; 427 P. 2d 988, 995; 59 Cal. Rptr. 276, 283.

court's power extends to all such cases. It is not limited to those cases in which an appellate court would sustain either the granting or denial of a motion for new trial on the ground of insufficiency of the evidence. The court shall prescribe the time within which the defendant must accept the additur, and in no case may this time be longer than the jurisdictional period for granting a new trial . . . If the defendant fails to consent within the prescribed time, the order granting the new trial becomes final.

If the court decides to order an additur, it should set the amount that it determines from the evidence to be fair and reasonable. In this respect it should exercise its completely independent judgment. It need not fix either the minimum or maximum amount that it would have sustained on a motion for new trial or the minimum or maximum amount that would be supported by substantial evidence and therefore sustainable on appeal. If the defendant deems the additur excessive, he may reject it and seek to sustain the jury's award on an appeal from the order granting a new trial. If the plaintiff deems the additur insufficient, he may raise the issue on an appeal from the judgment as modified by the additur.

Following this decision, the California Law Revision Commission recommended legislation to restate these principles in the California *Code of Civil Procedure*[10] as follows:

> Section 1. Section 662.5 of the Code of Civil Procedure is amended to read:
>
> 662.5. In any civil action where an order granting a new trial limited to the issue of damages would be proper, the trial court may:
>
> (a) Grant a motion for a new trial on the ground of inadequate damages and make its order subject to the condition that the motion for a new trial is denied if the party against whom the verdict has been rendered consents to an addition of so much thereto as the court in its independent judgment determines from the evidence to be fair and reasonable.
>
> (b) Grant a motion for a new trial on the ground of excessive damages and make its order subject to the condition that the motion for a new trial is denied if the party in whose favor the verdict has been rendered consents to a reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable.

2. Evidence

It appears that additur or remittitur (in those states where it is permitted) are only available where a new trial could be ordered on the ground of inadequate or excessive damages. The new trial would be confined solely to the issue of damages.

Section 662.5 of the *California Code of Civil Procedure* recognizes the practices of additur and remittitur. No procedure is specified under that section and no procedural limitations that may exist by statute or common law are affected by the section. Additur or remittitur is only permitted where, after weighing the evidence, the court is convinced that the award of damages is clearly inappropriate. The evidence considered consists of the entire record, including reasonable inferences drawn from the record. It does not appear that the court is permited to consider new evidence.

3. Approaches to Additur and Remittitur

In California, upon a motion for a new trial on the ground of inadequate or excessive damages, the trial judge has discretion to determine what award he would have made on the evidence. That appears to be the most desirable approach to determining the amount to be added or subtracted from judgment. Different approaches have been adopted in other jurisidictions.

Because of the constitutional problems that arise with respect to the right to trial by jury, a number of different approaches to additur and remittitur have been adopted in various U.S. jurisdictions. These approaches are designed to avoid two problems:

(a) prejudice to the non-consenting party who relies upon the jury's verdict;

(b) arriving at a verdict inconsistent with the jury's verdict.

In some jurisdictions additur is permitted only where the increase can be established by definite rules of law. This approach (adopted in Illinois, Kansas and Massachusetts) amounts to little more than correcting a mistake made by the jury when measuring damages. For example, the jury might omit an award for interest from the verdict. The trial judge has a discretion to increase the verdict to include interest. British Columbia courts already have a jurisdiction to correct mistakes in jury awards.

Another approach is to increase an inadequate award to the maximum amount supported by substantial evidence. This approach to additur is intended to safeguard the plaintiff's

[10] *Recommendation Relating to Additur and Remittitur*, September 1968, (1969) 9 California Law Revision Committee, 63, 68.

constitutional right to trial by jury. The plaintiff could not hope to get more than the maximum amount supported by substantial evidence, since, if more were awarded by a jury, it would be reduced on appeal.[11] Very few defendants would consent to additur on that basis.

Another approach is to increase an inadequate award to the minimum amount supported by substantial evidence. This approach to additur is based upon the presumption the jury intended to award the smallest legally permissible amount on the evidence. The argument to the contrary is that an inadequate award is evidence of jury error or malfunction and that no award should be based on their verdict. That hypothesis is fundamental to the reluctance at common law to order new trials confined to the question of damages alone.

Presumably, defendants would be prepared to consent to judgment in the lowest permissible amount. Plaintiffs would appear to be significantly prejudiced by this approach.

Some jurisdictions adopt a similar approach to remittitur, reducing an excessive award to the maximum amount permissible on the evidence. This approach to remittitur is based on the presumption that the jury intended to award damages to the largest permissible amount. It is open to criticisms similar to those with respect to the corresponding approach to additur.

Under the Wisconsin rule, if inadequate damages are awarded, the court will, on motion, order a new trial, unless:

(a) the defendant consents to judgment in the highest amount the jury could reasonably have awarded; or

(b) the plaintiff consents to judgment in the least amount allowable.

If the jury has awarded excessive damages, the court will, on motion, order a new trial, unless:

(a) the plaintiff consents to judgment to the least amount allowable; or

(b) the defendant consents to judgment in the highest amount supportable by the evidence.

Only Wisconsin adopted this approach, and it was abandoned in 1960.[12] The approach rendered additur useless. No plaintiff would consent to judgment in the least amount to which he was entitled. No defendant would consent to judgment for the greatest amount allowable. It appears that Wisconsin has since adopted the California approach. The trial judge determines the award according to a reasonable amount and additur or remittitur are based on that amount.

There is one approach to additur which is not aimed at setting guidelines for determining what the verdict should have been. It is designed to avoid the problem of prejudicing the non-consenting party who relies on the jury's verdict. The plaintiff makes a motion for a new trial or in the alternative, an amount over and above the jury's verdict. The motion the plaintiff makes implies consent to entry of judgment in any increased amount. Presumably a similar approach can be taken with respect to remittitur.

The various approaches to additur and remittitur discussed above, are largely designed to avoid constitutional problems that arise with respect to a litigant's right to trial by jury. It appears that the approach that functions best with respect to additur and remittitur is to determine the amount of a reasonable award on the evidence. That that approach has not been universally adopted in the United States is the result of the fear that it is unconstitutional.

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[11] *See Dorsey* v. *Barba*, 38 Cal. 2d 350, 358, 240 P. 2d 604, 608 (1952); *O'Connor* v. *Papertsian*, 309 N.Y. 465, 131 N.E. 2nd 883 (1956).

[12] *Powers* v. *Allstate Insurance Co.*, 10 Wis. 2d 78, 102 N.W. 2d 393 (1960).

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